Abbreviation of

Principles of Islamic Jurisprudence (Part 2)

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Chapter Eight: Ijmaa' or Consensus of Opinion

It must be noted at the outset that unlike the Qur'an and Sunnah, ijmaa does not directly partake in divine revelation. **Ijmaa' is basically a rational proof**.

The theory of ijmaa' is also clear on the point that it is a **binding proof**.[1] But it seems that the very nature of this high status that is accorded to ijmaa` has demanded that **only an absolute and universal consensus would qualify** although it has often been difficult to obtain.

It is only natural and reasonable to accept ijmaa` as a reality and a valid concept in a relative sense, but factual evidence falls short of establishing the universality of ijmaa`.

The classical definitions of ijmaa`, as laid down by the ulama of usul, are categorical on the point that nothing less than a universal consensus of the scholars of the Muslim community as a whole can be regarded as conclusive ijmaa'…

The notion of a universal ijmaa ` was probably inspired by the ideal of the political unity of the ummah, and its unity in faith and tawhid, rather than total consensus on juridical matters. As evidence will show, ijmaa' on particular issues, especially on matters that are open to ijtihaad, is extremely difficult to prove. Thus the gap between the theory and practice of ijmaa` remains a striking feature of this doctrine.

**A universal ijmaa`** can only be said to exist, as al-Shafi'i has observed, on the obligatory duties, that is, the **five pillars of faith**, and other such matters on which the Qur'an and the Sunnah are decisive.[2] However, the weakness of such an observation becomes evident when one is reminded that ijmaa` is redundant in the face of a decisive ruling of the Qur'an or Sunnah.

The Shari'ah has often been considered as diversity within unity'. This is true in a general sense, in that there is unity to the essentials and in the broad outlines of the ahkaam.

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[1] [Al-Haj: There are two types of binding proofs: one that is definitive, and that is like a perspicuous statement of the Quran and mutawatir hadeeth (and certain ahad hadeeths as well according to some,) and there is the speculative proof, such as when the implication of the verse or hadeeth is open to ijtihaad, or when the transmission of a hadeeth is not certain. There is an agreement amongst Ahl-us-Sunnah that such proof is still binding in matters of practical actions; it is also the stronger position that they are binding in matters of creed as well. Of the major differences between the two types of binding proofs is that the denier of the first will be a disbeliever after being educated, while the same is not true for the second (speculative proof.) As for ijmaa', when it is certain, it is of the first type or proofs and when not, then it still serves as a binding proof, but of the speculative type.]

[2] [Al-Haj: Ash-Shafi'i (may Allah be pleased with him) only gave some examples. However, universal ijmaa' is established on other subtler matters, such as the granddaughter getting one sixth of the inheritance with the daughter, and that the grandfather will always inherit in the presence of siblings, and the prohibition of co-wifery between a woman and her aunt, and many other prohibitions.]

Ijmaa' has often been claimed for rulings on which only a majority consensus existed within or beyond a particular school.

The only form of ijmaa' which has been generally upheld is that of the Companions.

[Definition]

Ijmaa` is the **verbal noun of the Arabic word ajma'a**, which has two meanings: **to determine**, and to agree upon something. This usage of ajma` is found both in the Qur'an and in the Hadeeth.

[1. In the Qur'an the phrase **fa-ajmi'u amrakum** which occurs in sura Yunus (10:71) means **'determine your plan'**. [For details see Amidi, Ihkaam, I, 195; Shawkani, Irshaad, p.70.]

The other meaning of ajma'a is **`unanimous agreement'**. The second meaning of ijmaa` often subsumes the first, in that whenever there is a unanimous agreement on something, there is also a decision on that matter.

Ijmaa` is defined as the unanimous agreement of the mujtahidun, of the Muslim community of any period following the demise of the Prophet Muhammad on any matter**. [2. Amidi, Ihkam, I, 196, Shawkani, Irshaad, p.71. Abu Zahrah and `Abd al-Wahhab Khallaf's definition of ijmaa` differs with that of Amidi and Shawkani on one point, namely the subject matter of ijmaa `, which is **confined to shar'i matters only (see Abu Zahrah, Usul, p.156 and Khallaf, `Ilm, p. 45).]

In this definition, the **reference to the mujtahidun** precludes the agreement of laymen from the purview of ijmaa`.

The reference in the definition to **any matter** implies that ijmaa` applies to all juridical (shar'i), intellectual (aqli), customary (urfi,) and linguistic (lughawi) matters.[3. Shawkani, Irshaad, p.71.]

Furthermore, **shar'i, in this context is used in contradistinction to hissi**, that is, matters which are perceptible to the senses and fall beyond the scope of ijmaa`.

Some ulama have **confined ijmaa' to religious**, and others to shar'i matters, but the majority of ulama do not restrict ijmaa` to either.

Although the majority of jurists consider **dogmatics (i'tiqadiyat)** to fall within the ambit of ijmaa`, some held that ijmaa` may not be invoked in subjects as the existence of God or the truth of the prophet. Ijmaa` derives its validity from the nusoos on the infallibility (`ismah) of the ummah. Now **if one attempts to cite ijmaa` in support of these dogmas, this would amount to circumlocution**. **To illustrate** the point further, it may be said that the **Qur'an cannot be proved by the Sunnah**, because the Qur'an.

According to one view, attributed to the **Qadi `Abd al-Jabbar**, matters pertaining to **warfare**, **agriculture**, **commerce**, **politics** are described **as worldly affairs**, and ijmaa` is no authority regarding them. **One reason given in support of this view is that the Prophet himself precluded these matters from the scope of the Sunnah**. Amidi confirms the majority view when he adds (in his Ihkam, I, 284) that these restrictions do not apply to ijmaa'.

Matters of a practical type do not constitute the proper subject of ijmaa`. For example, the agreement of the Companions to send out troops to Syria or to Persia, or their agreement on setting up certain government departments. [5. Abu Zahrah, Usul, p. 165.]

In actual terms, **ijmaa' has always been selective in determining its own subject-matter**. It was perhaps in view of the dynamic nature of ijmaa` and its infallibility that the ulama were persuaded not to impose any advance reservations on its scope.

It is clear from its definition that ijmaa' can only occur **after the demise of the Prophet**. For the agreement or disagreement of others did not affect the overriding authority of the Prophet.

[The Functions of Ijmaa']

The essence of ijmaa` lies in the natural growth of ideas. It begins with the personal ijtihaad and culminates in the universal acceptance of a particular opinion over a period of time. Differences of opinion are tolerated until a consensus emerges, and in the process there is no room for compulsion.

Ijmaa' plays a crucial role in the development of Shari'ah. The existing body of fiqh is the product of a long process of ijtihaad and ijmaa`. **The idea that ijmaa` came to a halt after the first three generations** following the advent of Islam seems to be a **by-product of the phenomenon known as the closure of the gate of ijtihaad**. This is, however, no more than a superficial equation, as in all probability ijmaa' continued to play a role in consolidating and unifying the law after the supposed termination of ijtihaad. [7. Cf Ahmad Hasan, Early Development, p.160ff.]

Ijmaa' ensures the correct interpretation of the Qur'an and Sunnah, and the legitimate use of ijtihaad. The question as to whether the divine sources have been properly interpreted is always open to a measure of doubt. **Only ijmaa' can put an end to doubt**.

Ijmaa` has been regarded as the instrument of conservatism** and of preserving the heritage of the past. However, ijmaa` is also an instrument of tolerance and of the evolution of ideas in such directions as may reflect the vision of the scholars to the light of the fresh educational and cultural achievements for the community. According to one observer, `clearly this principle (i.e. ijmaa`) provides Islam with a potential for freedom of movement and a capacity for evolution. **It furnishes a desirable corrective against the dead letter of personal authority. [8. Goldziher, Introduction, p.52.]

Ijmaa` enhances the authority of rules which are of speculative origin**, for once an ijmaa` is held in their favor, they become definite and binding. Instances can be cited, for example, where **the Companions have, **by their ijmaa'**, **upheld the ruling of a solitary Hadeeth**. For example, the **prohibition concerning unlawful conjunction**, that is, simultaneous marriage to the maternal or paternal aunt of one's wife, is a definitive ruling which is based on ijmaa `, despite the fact that the basis of this ijmaa` is a solitary Hadeeth.

**Ijmaa` also played a role in regard to aHadeeth that were not equally** known to all the mujtahidun especially driving the period preceding the collection and compilation of Hadeeth. It was through ijmaa` that some scholars were informed of the existence of certain aHadeeth. [9. Muslim, Saheeh, p.212, Hadeeth no. 817; Ibn Majah, Sunan, II, 910, Hadeeth no. 2724; Abu Zahrah, Usul, pp.159-161.]

**And lastly, ijmaa` represents authority.** Once an ijmaa is established it then becomes common practice to quote the law without a reference to the relevant sources. It is partly due to the significance of ijmaa` that the incentive to quote the authority tends to weaken. This is according to Shah Wali Allah, one of the reasons which induced the jurists to recognize ijmaa` as the third source of the Shari'ah [10. Shah Wali Allah, Qurrah, p.40.].

Essential Requirements (Arkaan) of Ijmaa`

1. **There are a number of mujtahidun available** at the time when the issue is encountered. For consensus can never exist unless there is a plurality of concurrent opinion. [Khallaf, `Ilm, p.45ff; Shawkani, Irshaad, p.71ff.]

2. 3. **According to the majority, unanimity is a prerequisite of ijmaa`.** All the mujtahidun, regardless of their locality, race, color and school or following, must reach a consensus. If, for example, the mujtahidun of Mecca and Madinah, or those of Iraq, or the mujtahidun of the family of the Prophet, or the Sunni ulama without the agreement of their Shi'i counterparts[3] agree upon a ruling, no ijmaa' will materialise.

The majority of ulama maintain that lay opinion is not taken into account: in every field of learning, only the opinion of the learned is relevant to ijmaa`. **Al-Amidi**, **however**, **prefers the minority view**, attributed to Abu Bakr al-Baqillani and others, to the effect that ijmaa' includes the agreement of both the laymen and the mujtahidun, the reason being that **'ismah is a grace** of God bestowed on the **whole community**. It would be improper to turn the property of the community into a privilege of the mujtahidun. The **majority** view is that the **mujtahidun**, **in their capacity as the constituents of ijmaa`**, **merely represent the community**, and therefore no change is proposed in the original locus of 'ismah.[12. Amidi, Ihkam, I, 226. **Bazdawi**, **however**, **distinguishes matters which do not require specialized knowledge** from other matters, and suggests that Ijmaa` is confined to the mujtahidun only in regard to matters which require expert knowledge. See for details, Bazdawi, Usul, III, 239.]

4. 5. The agreement of the mujtahidun must be **demonstrated by their expressed opinion** on a particular issue. This may be **verbal or in writing**; or it may be that every mujtahid expresses an opinion, and after gathering their views, they are found to be in agreement.

6. 7. As a corollary of the second condition above, ijmaa' consists of the agreement of **all the mujtahidun**, and not a mere majority among them. However, **according to Ibn Jareer al-Tabari**, **Abu Bakr al-Razi**, **one of the two views of Ahmad Ibn Hanbal and Shah Wali Allah**, **ijmaa' may be concluded by a majority** opinion. But al-Amidi prefers the majority view [13. Amidi, Ihkam, I, 235.] on this point.

8. In regard to the rules of fiqh, it is the **ijmaa' of the fuqahaa alone** which is taken into account.[14. Shawkani, Irshaad, p.71.] The question naturally arises whether **fuqahaa belonging to certain factions like the**

[3] [Al-Haj: Their disagreement was largely unrecognized as a breach of ijmaa' by the Sunni scholars. It is noteworthy here that the imamates and kharijites don't acknowledge the proof-value of ijmaa' to begin with. See the discussion below about this.]

Khawarij, **the Shi'ah**, or those who charged with heresy and bid'ah are qualified to participate in ijmaa`. According to the **majority**, if a faqeeh is **known to have actively invited the people to bid'ah**, **he is excluded** from ijmaa' ; otherwise he is included in the ranks of ahl al-ijmaa'.[15. Abu Zahrah, Usul, p.162.] **The Hanafis preclude a transgressor** (**fasiq**) and one who does not act upon his doctrine.[16. Amidi, Ihkam, I, 261; `Abdur Rahim, Jurisprudence, p.122.]

Some fuqahaa have held that ijmaa` is concluded only with the **disappearance of the generation** (inqirad al-'asr), that is, when the mujtahidun who took part in it have all passed away. For if anyone changes his view, the ijmaa` would collapse. [17. Abu Zahrah, Usul, p.164.] The **majority** of jurists, however, maintain that this is **not a condition** of ijmaa` and that **ijmaa` not only binds the next generation but also its own participants**.[18. Shawkani, Irshaad, p.71.]

With regard to the tacit ijmaa `(for which see below), too, some jurists have held that it is concluded only after the death of its participants, so that it can be established that none of them have subsequently expressed an opinion. For when they break their silence they will no longer be regarded as silent participants, and may even turn a tacit ijmaa` into an explicit one. **The majority of ulama**, **nevertheless**, **refuse to place any importance on the `disappearance of the generation'**, for in view of the **overlapping of generations** (**tadakhul al-a'sar**), it is impossible to distinguish the end of one generation from the beginning of the next. [19. Amidi, Ihkam, I, 257; Ibn Hazm, Ihkam, IV, 154.] However, al-Ghazali resolved this by stating that `for the formation of ijmaa `, it is enough that agreement should have taken place, even if only for an instant'.[20. Ghazali, Mustasfa, I, 121.]

**When ijmaa` fulfills the foregoing requirements**, it becomes binding (wajib) on everyone. Consequently, the **mujtahidun of a subsequent age are no longer at liberty to exercise fresh ijtihaad** over the same issue. For once it is concluded, ijmaa` is not open to amendment or abrogation (naskh).

**The rules of naskh are not relevant to ijmaa`** in the sense that ijmaa` can neither repeal nor be repealed. This is the majority view, although some jurists have stated that the constituents of ijmaa` themselves are entitled to repeal their own ijmaa' and to enact another one to its place. But once an ijmaa' is finalized, especially when all of its constituents have passed away, no further ijmaa' may be concluded. [21. Khallaf, `Ilm, pp. 46-47; Abu Zahrah, Usul, p. 167.]

Proof (Hujjiyyah) of Ijmaa`

[Al-Haj: to avoid confusion in studying this particular topic, keep in mind the following:

The proof-value of ijmaa’ in general is agreed upon by the scholars of Ahl-us-Sunnah, and contest to it has been traditionally attributed to an-Nazzam of al-Mu’tazilah.

All of the scholars who will be mentioned doubting the proof-value of a certain verse or hadeeth on the matter of ijmaa’ have already confirmed their acceptance of the doctrine of ijmaa’, as you will see below, and that is based on the collectivity of proofs on its proof-value not the definitiveness of any of them separately, though many others found definitive proof in some of them.

As for the feasibility and types of ijmaa', know that, as there are speculative proofs in the Quran and Sunnah with regard to implication, and the Sunnah with regard to establishment, there are also speculative ijmaa's. and that is because ijmaa' is of two types:

a. Definitive: that is the explicit ijmaa` (al-ijmaa' al-sareeh) in which every mujtahid expresses his opinion either verbally or by an action; and they all agree, and the transmission from them is mutawatir, and that ijmaa' was not only feasible at the time of the sahabah, but occurred and there is a number of ijmaa's that belong to this category, such as that the granddaughter takes one sixth of the inheritance with the daughter and the prohibition of co-wifery between a woman and her aunt…etc. That is the special type known by the scholars, however, there is the bigger category within this type of ijmaa', which is the public ijmaa', as in their agreement on the pillars of faith and prohibition of pork and theft…etc.

b. Speculative: and that is the tacit ijmaa`(al-ijmaa `al-sukuti) whereby some of the mujtahidun of a particular age give an expressed opinion concerning an incident while the rest remain silent. It may be also speculative because of its transmission through ahad or its establishment by a scholar based on his inductive reading of the fiqhi literature and failure to find a counter position.

While the first type is agreed upon its proof-value in the time of the sahabah, but its feasibility afterwards is doubted, the second type is more common and frequent, and establishing its proof-value is paramount, because doing away with it leaves the gates wide open to re-evaluate most of the settled principles and instructions of shari'a acted upon by the Muslims over the past fourteen centuries, thereby compromising its integrity and shaking people's certainty in its guidance.

We must first say that this type of ijmaa' must not be equal to the first, and shouldn't impart positive knowledge, and must not be used as a final argument in the face of counter arguments, particularly if they come from the primary sources or the sayings and/or practice of the righteous predecessors. Then, how do we use it? We can consider it ijmaa' and hujjah (proof) or hujjah (here, speculative proof) but not ijmaa', or neither. The very vast majority considered it either one or two, and what seems stronger out of the to, and also supported by the majority is the second position, simply to use it as another proof that stands to analytical critique and being weighed against the other proofs. This position is the strongest, and it is the position of:

As-Sarakhsiy, who attributed it in his usool to the Hanafis.[4]

AL-Amidiy[5], who attributed it to al-Imam ash-Shafi'ee as one of his two positions.

Ibn Taymiyah, who cautioned that it should not be made definitive, and thereby used to counter clear textual proofs.[6]

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[4] أصول السرخسي ج 1 ص 303 - أصول السرخسي [كتاب]/ المؤلف محمد بن أحمد بن أبي سهل السرخسي أبو بكر - بيروت: دار المعرفة.

[5] الإحكام للآمدي - 1 / 315 - الإحكام في أصول الأحكام [كتاب]/ المؤلف علي بن محمد الآمدي أبو الحسن/ تحقيق : د. سيد الجميلي. – بيروت: دار الكتاب العربي، 1404هـ. - الأولى .

[6] مجموع الفتاوى 19 /267-268 - كتب ورسائل وفتاوى شيخ الإسلام ابن تيمية [كتاب]/ المؤلف أحمد عبد الحليم بن تيمية الحراني أبو العباس/ تحقيق: عبد الرحمن بن محمد بن قاسم العاصمي النجدي. - القاهرة: مكتبة ابن تيمية، الثانية.

Al-Ghazaliy, who went further to choose that it is ijmaa' if the circumstantial evidence indicates the acceptance of those who stayed silent.[7]

Ibn Fawrak, who reported it from the majority of the Shafi'ees, and it is attributed to Ahmad, in one report from him, and they considered it ijmaa' after the end of era of those fuqahaa' who witnesses the discourse , given no one of them shows disagreement before his death.[8]

Some Shafi'ees considered it both hujjah (proof) and ijmaa', and this was reported by Abi Ishaaq ash-Shirazi, who said, "our companions disagreed over calling it ijmaa', though they all agree on acting upon it.

Ash-Shawkani summarized all of the positions in his masterpiece, *Irshaad al-Fuhool Ila Tahqeeq al-Haqq min 'Ilm al-Usool*.[9]

As for the feasibility of this type of ijmaa', it is obviously feasible, and an Imam like Ibn Hazm, with his known inclination towards verification wrote a book on the matters agreed upon and called it "*Maratib al-Ijmaa*". In an encyclopedic work on the subject by a contemporary scholar, Sa'di Abi Habeeb, he collected the matters claimed to be agreed upon in a three volume work, which he called, *"Mawsoo'at al-Ijmaa' fi-lFiqh al-Islami."* In this book, he counted:

1- Ijmaa' of sahabah at 210.
2- A statement of a sahabi, not known to be countered by another sahabi: 548.
3- Ijmaa' of all Muslims: 654.
4- Ijmaa' of Mujtahids: 1550.
5- Denial of the presence of a counter position: 1148.
6- Mentions of ijmaa', where claimant didn't say who agreed: 4468.

The consistent universal uninterrupted practice of all 'ulama to quote and cite ijmaa's and use them in their arguments are sufficient to show the strength of the position here above. End of Al-Haj's insertion]

Proof (Hujjiyyah) of Ijmaa`

The ulama have sought to justify ijmaa` on the authority of the Qur'an, the Sunnah, and reason. They have on the whole maintained the impression that the textual evidence in support of ijmaa' does not amount to a conclusive proof. Al-Ghazali and al-Amidi are of the view that when compared to the Qur'an, the Sunnah provides a stronger argument in favor of ijmaa'. [22. Ghazali, Mustasfa, I, III, Amidi, Ihkam, I, 219.]

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[7] المستصفى في علم الأصول 1 / 152 - 116- المستصفى في علم الأصول [كتاب]/ المؤلف محمد بن محمد الغزالي أبو حامد/ تحقيق: محمد عبد السلام عبد الشافي. - بيروت: دار الكتب العلمية، 1413 هـ. - الأولى.

[8] اللمع في أصول الفقه - (ج 1 / ص 48) . - اللمع في أصول الفقه [كتاب]/ المؤلف أبو إسحاق إبراهيم بن علي الشيرازي. – بيروت: دار الكتب العلمية، 1405هـ, 1985م. - الأولى.

[9] إرشاد الفحول الي تحقيق الحق من علم الاصول - (ج 1 / ص 179) - إرشاد الفحول إلى تحقيق علم الأصول [كتاب]/ المؤلف محمد بن علي بن محمد الشوكاني/ تحقيق: محمد سعيد البدري أبو مصعب. - بيروت: دار الفكر، 1412 هـ.

Ijmaa' in the Qur'an:

The Qur'an (al-Nisa', 4:59) is explicit on the requirement of obedience to God, to His Messenger, and the ulu al amr. [23. The ayah (4:59) provides: **'O you who believe**, **obey God**, **and obey** the Messenger, **and those who are in charge of affairs**.'] According to al-Fakhr al-Razi, since God has commanded obedience to the ulu al-amr, the judgment of the ulu al-amr must therefore be immune from error. For God cannot[10] command obedience to anyone who is liable to committing errors.[24. Razi, Tafseer, III, 243.] The word `amr' includes secular and religious affairs. According to a commentary attributed to Ibn 'Abbas, ulu al-amr in this ayah refers to ulama, whereas other commentators considered it to be a reference to the umaraa' , that is, 'rulers and commanders'. The zahir of the text enjoins obedience to each in their respective spheres. [25. Khallaf, `Ilm, p. 47.]

Further support for this conclusion can be found elsewhere in sura al-Nisa' (4:83) which once again confirms the authority of the ulu al-amr next to the Prophet himself. [26. The ayah (4:83) provides: **`If they would only refer it to the Messenger and those among them who hold command**, **those of them who investigate matters would have known about it**.**'** (Irving's translation, p. 45.)]

The one ayah which is most frequently quoted in support of ijmaa' occurs in sura al-Nisa' (4:115), which is as follows: **'And anyone who splits off from the Messenger after the guidance has become clear to him and follows a way other than that of the believers**, **We shall leave him in the path he has chosen**, **and land him in Hell**. **What an evil refuge**!**'** The commentators observe that `the way of the believers in this ayah refers to their 'agreement and the way that they have chosen', in other words, to their consensus. Departing from the believers' way has been approximated to disobeying the Prophet.

The Qur'an is expressive of the dignified status that God has bestowed on the Muslim community. Thus we read in sura Al-`Imran (3:109): **`You are the best community that has been raised for mankind**. **You enjoin right and forbid evil and you believe in God**.**'** This ayah attests to some of the outstanding merits of the Muslim community. On the same theme, we read in sura al-Baqarah (2:143): **`Thus We have made you a middle nation [ummatan wasatan]**, **that you may be witnesses over mankind**.**'** Literally, wasat means `middle', implying justice and balance, qualities which merit recognition of the agreed decision of the community and the rectitude of its way. Furthermore, it is by virtue of uprightness that God has bestowed upon the Muslim community the merit of being a `witness over mankind'.[27. Amidi, Ihkam, I, 211.] In yet another reference to the ummah, the Qur'an proclaims in sura al-A'raf (7:181): **`And of those We created are a nation who direct others with truth and dispense justice on its basis**.**'**

There are three other ayat which need to be quoted. These are: Al-'Imran (3:102):**`Cling firmly together to God's rope and do not separate**.**'** This ayah obviously forbids separation (tafarruq). Since opposition to the ijmaa' is a form of tafarruq, it is therefore prohibited.[28. Amidi, Ihkam, I, 217; Ghazali, Mustasfa, I, 111.]

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[10] [Al-Haj: I would use, "wouldn't command."]

Al-Shura (42:10):**'And in whatever you differ, the judgment remains with God'**, 'which implicitly approves that in which the community is in agreement.'[29. Ghazali, Mustasfa, I, 111.] Al-Nisa' (4:59): **`Then if you dispute over something, refer it to God and the Messenger.'** By implication (i.e., divergent implication -mafhoom al-mukhalafah), this ayah too upholds the authority of all that is agreed upon by the community.[30. Ghazali, Mustasfa, I, 111.]

[Disagreement on the Interpretation.]

Having quoted all the foregoing ayat, **al-Ghazali** observes that 'all of these are apparent indications (zawahir) none of which amounts to a clear nass on the subject of ijmaa `.' Al-Ghazali adds that of all these, the ayah at 4:115 is closest to the point. **Al-Shafi`i** has also quoted it, and according to him, following a way other than that of the believers is haram.[31. Ghazali, Mustasfa, I, 111.] But despite this, al-Ghazali explains that the main theme of this ayah is a warning against disobedience to the Prophet and hostility against the believers. It would appear that al-Ghazali does not agree with the conclusion that al-Shafi'i has drawn from this ayah. **Jalal al-Din al-Suyutiy's** interpretation of the same ayah is broadly in line with what al-Ghazali had to say. [32. Suyutiy, Tafseer, I, 87.] **Al-Shawkani adds**: 'A number of ulama have drawn the conclusion that this ayah provides the authority for ijmaa'. But this is an unwarranted conclusion, as following a way other than that of the believers means renouncing Islam.' Al-Shawkani further suggests that the occasion of revelation (sha'n al-nuzool) relates to apostasy. Specifically, it is reported that Tu`mah b. Ubayraq accused a Jew of a theft he committed himself. As a result of the revelation of this ayah, the Jew was cleared of the charge but Tu`mah himself renounced Islam and fled to Mecca. [33. Shawkani, Fath al-Qadir, I, 515; idem., Irshaad, p. 75.] **Muhammad 'Abduh** further remarks that to quote this ayah in support of ijmaa` leads to irrational conclusions, for it would amount to drawing a parallel between those who are threatened with the punishment of Hell and a mujtahid who differs with the opinion of others. 'Abduh concludes that the sha'n al-nuzool of this ayah does not lend support to the conclusion that al-Shafi'i has drawn from it.[34. Rashid Rida, Tafseer al-Manar, V, 201. For a similar view see Sadr, Ijmaa', p.40.] **Al-Amidi** discusses the Qur'anic ayat concerning ijmaa', and concludes that they may give rise to a probability (zann) but they do not impart positive knowledge. If we assume that ijmaa` is a decisive proof, then establishing its authority on the basis of speculative evidence is not enough. [36 Amidi, Ihkam, I, 218.]

2. The Sunnah on Ijmaa `

The Hadeeth most frequently quoted in support of ijmaa' reads: **`My community shall never agree on an error.'** [37. Ibn Majah, Sunan, II, 1303. Hadeeth no. 3950.] The last word in this Hadeeth, namely al-dalalah, is rendered in some reports as al-khata'.' The jurists have used the two words interchangeably, but in the classical Hadeeth collections this Hadeeth has been recorded with the word al-dalalah. [38. Cf. Ahmad Hasan, Doctrine, p.60.] **Al-Ghazali pointed out** that this Hadeeth is not mutawatir, and as such, it is not an absolute authority like the Qur'an. The Qur'an on the other hand is mutawatir but contains no nass on ijmaa`. However, **al-Ghazali** adds that a number of prominent Companions have reported aHadeeth from the Prophet, which although different in their wording, is all in consonance on the theme of the infallibility of the community and its immunity from error.[39. Ghazali, Mustasfa, I, 111.]

Leading figures among the Companions such as 'Umar b. al-Khattab, `Abdullah b. Mas'ood, Anas b. Malik. `Abdullah b. Umar, Abu Said al-Khudriy, Abu Hurayrah, Hudhayfah and others have reported aHadeeth which include the following:

1. My community shall never agree upon an error (al-khata'):

2. God will not let my community agree upon an error:

3. I beseeched Almighty God not to bring my community to the point of agreeing on dalalah and He granted me this:

4. Those who seek the joy of residing in Paradise will follow the community. For Satan can chase an individual but he stands farther away from two people:

5. The hand of God is with the community and (its safety) is not endangered by isolated oppositions:

6. Whoever leaves the community or separates himself from it by the length of a span is breaking his bond with Islam:

7. A group of my ummah shall continue to remain on the right path. They will be the dominant force and will not be harmed by the opposition of opponents:

8. Whoever separates himself from the community and dies, dies the death of ignorance (jahiliyyah):

9. And finally, the well-known saying of 'Abdullah b. Mas'ud which is as follows: 'Whatever the Muslims deem to be good is good in the eyes of God. [40. Amidi considers this to be a Hadeeth whose chain of narration goes back to the Prophet (see his Ihkam, I, 214). Ahmad Hasan points out that Muhammad b. Hasan al-Shaybaniy initially reported this as a Hadeeth, but later it was attributed to Ibn Mas'ud (see his Doctrine, p. 37).]

Having quoted these (and other) aHadeeth, both **al-Ghazali and al-Amidi** observe that their **main theme and purport has not been opposed by the Companions**, the Successors and others throughout the ages. The ulama continued to rely on them in their exposition of the general and detailed rules of Shari'ah. In answer to the point that all these are solitary (ahad) reports which do not amount to a definitive proof, the same authors **observe** that the **main purport of these aHadeeth nevertheless conveys positive knowledge**. [41. Ghazali, Mustasfa; I, 111; Amidi, Ihkam, I, 220-221.]

As to the question whether 'dalalah' and `khata', could mean disbelief (kufr) and heresy (bid'ah), it is observed that khata' is general and could include kufr but that dalalah does not, for dalalah only means an error or erroneous conduct. [43. Ghazali, Mustasfa, I, 112: We find in the Qur'an, for example, in an address to the Prophet Muhammad: **And He found then wondering [dallan] and gave thee guidance** (al-Duha, 93:7). In another place the Qur'an relates of Moses the following words: **`He said: I did it then [i.e. slayed the Egyptian] when I was in error'** (al-Shu'ara', 26:20). In both these instances dalaal does not imply disbelief. Similarly the Arabic expression dalla fulan `an al-tariq (so-and-so lost his way).] **If dalalah meant disbelief**, then the aHadeeth would fail to provide an authority for the infallibility of the ummah, but if it meant an error only, then they could.

It is further observed that the article 'la' in the Hadeeth under discussion could either imply negation (nafy) or prohibition (nahy). If the latter, it would simply prohibit the people from deviation, and as such the Hadeeth could not sustain the notion of infallibility for the ummah.[45 Sadr Ijmaa', p. 43.]

So long as the Hadeeth is open to such doubts, it cannot provide a decisive proof (daleel qat'i) for ijmaa'.[46. Sadr. Ijmaa`, 43.]

It is further suggested that some of the foregoing aHadeeth (nos. 4, 5 and 6 in particular) simply encourage fraternity and love. As for our Hadeeth number seven, although al-Ghazali quotes it, it is not relevant to ijmaa`, as it obviously means that a group of the ummah shall remain on the right path, not the ummah as a whole.[11] The Shi'ah Imamiyyah have quoted this Hadeeth in support of their doctrine of the ijmaa' of ahl al-bayt, which refers to the members of the family of the Prophet.[48. Sadr, Ijmaa', pp. 44-45.]

The word `ummah' (or jama'ah) in the foregoing aHadeeth means, according to one view, the overwhelming majority of Muslims. According to another view, jama'ah refers to the scholars of the community only. According to yet another opinion, ummah (and jama'ah) refers only to the Companions, who are the founding fathers of the Muslim community. [49. Cf. Hasan, Doctrine, p.59.] And finally, ummah and jama`ah refer to the whole of the Muslim community and not to a particular section thereof. The grace of 'ismah, according to this view, is endowed on the whole of the community. Thus is the view of **al-Shafi'i**, who wrote in his Risalah: 'And we know that **the people at large** cannot agree on an error or on what may contradict the Sunnah of the Prophet. [50. Shafi'i's Risalah (trans. Khadduri), p.285.]

Notwithstanding the doubts and uncertainties in the nusoos, the majority of ulama have concluded that the consensus of all the mujtahidun on a particular ruling is a sure indication that the word of truth has prevailed over their differences; that it is due to the strength of that truth that they have reached a consensus.[12]

Since ijtihaad is founded on sound authority in the first place, the unanimous agreement of all the mujtahidun on a particular ruling indicates that there is clear authority in the Shari'ah to sustain their consensus. In the event of this authority being weak or speculative, we can only expect disagreement (ikhtilaaf), which would automatically preclude consensus. Ijmaa' in other words, accounts for its own authority.

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[11] [Al-Haj: In fact, it is of the strongest proofs; if a group of the ummah will always be correct, then the entire ummah will never agree on error. That group isn't a particular group because they could be right on some issues and wrong on others, and vice versa.]

[12] [Al-Haj: Even if each single proof is speculative, the 'ulama recognized that they, combined, lead to certitude, and here is what Imam as-Subki said, "what appears to me, and it is what I trust concerning my belief between me and Allah, is that the speculations arising from multitudes of corroborative evidences, synergizing one another, will lead to certitude. There are so many verses of the book and ahadeeth of the sunnah on the matter of [proof-value of] ijmaa', as well as rational proofs; the collectivity of those begets the conviction that the ummah shall not agree on an error, and certitude was attained from the combination, not any single individual proof."Al-Ibhaaj fi Sharh al-Minhaj 2/364.]

Feasibility of Ijmaa'

A number of ulama, including the **Mu'tazili leader Abraham al-Nazim [Ibraheem an-Nazzaam]** and **some Shi'i** ulama, have held that ijmaa` in the way defined by the jumhoor ulama **is not feasible**. [52. Shawkani, Irshaad, p. 79; Khallaf, `Ilm, p.48.] Since the mujtahidun would **normally be located in distant places**, cities and continents, access to all of them and obtaining their views is beyond the bounds of practicality. **Difficulties are also encountered in distinguishing a mujtahid from a non-mujtahid**. Apart from the absence of clear criteria concerning the attributes of a mujtahid, there are **some among them who have not achieved fame**. Even granting that they could be known and numbered, there is still **no guarantee to ensure that the mujtahid who gives an opinion will not change it before an ijmaa` is reached**. [53. Khallaf, `Ilm, p.49.] It is mainly due to these reasons that al-Shafi'i confines the occurrence of ijmaa` to the obligatory duties alone.[54. Shafi'i, Risalah, p.205; Abu Zahrah, Usul, p.158.] It is due partly to their concern over the feasibility of ijmaa` that according to the Zahiris and Imam Ahmad ibn Hanbal ijmaa' refers to the consensus of the Companions alone. Imam Malik on the other hand confines ijmaa` to the people of Madinah, and the Shi'ah Imamiyyah recognize only the agreement of the members of the Prophet's family (ahl al-bayt).

In Shi'i jurisprudence, ijmaa` is inextricably linked with the Sunnah. For the agreement of the ahl al-bayt (that is, their recognized Imams), automatically becomes an integral part of the Sunnah. `In the Shi'ite view', as Mutahhari explains, `consensus goes back to the Sunnah of the Prophet [...]. Consensus is not genuinely binding in its own right, rather it is binding inasmuch as it is a means of discovering the Sunnah. [55. Amidi, Ihkam, I, 230. Mutahhari, Jurisprudence, p.20.] In support of their argument that ijmaa is confined to the ahl al-bayt, the Shi'i ulama have referred to the Qur'an (al-Ahzab 33:33): **`God wishes to cleanse you, the people of the house [of the Prophet], of impurities.'** The Shi'i doctrine also relies on the Hadeeth in which the Prophet is reported to have said, **`I am leaving among you two weighty things, which, if you hold by them, you will not go astray: The Book of God, and my family.'** The reference in this Hadeeth, according to its Shi'i interpreters, is to 'Ali, Fatimah, Hasan and Husayn. The Sunnis have maintained, however, that the ayah in sura al-Ahzab was revealed regarding the wives of the Prophet and that the context in which it was revealed is different. Similarly, while quoting the foregoing Hadeeth, **al-Amidi** observes: `doubtlessly the ahl al-bayt enjoy a dignified status, but dignity and descent are not necessarily the criteria of one's ability to carry out ijtihaad. [56. Amidi, Ihkam, I, 246ff.]

There is yet another argument to suggest that ijmaa' is neither possible nor, in fact, necessary. Since ijmaa` is founded on ijtihaad, the mujtahid must rely on an indication (daleel) in the sources which is either decisive (qat'i) or speculative (zanni). If the former is the case, the community is bound to know of it. Furthermore, when there is qat'i indication, then that itself is the authority, in which case ijmaa' would be redundant. [57. Khallaf, `Ilm, p. 49.] Ijmaa`, in other words, can add nothing to the authority of a decisive nass. But if the indication in the nass happens to be speculative, then a speculative indication can only give rise to ikhtilaaf. [58. Khallaf, `Ilm, p 49; Shawkani, Irshaad, p.79.]

According to a report, **Ahmad b. Hanbal** said: It is no more than a lie for any man to claim the existence of ijmaa`. Whoever claims ijmaa` is telling a lie.[13] [59. Amidi, Ihkam, I, 198; Shawkani, Irshaad, p.73.]

The jumhoor ulama, however, maintain that ijmaa' is possible and has occurred. Note for example:

- The ijmaa' of the Companions on the exclusion of the son's son from inheritance, when there is a son;
- And their ijmaa' on the rule that land in the conquered territories may not be distributed to the conquerors;
- Or their ruling that consanguine brothers are counted as full brothers in the absence of the latter. [60. Abu Zahrah, Usul, p.159.] This last rule is based on a Hadeeth in which the Prophet counted them both as brothers without distinguishing the one from the other. [61. Abu Zahrah, Usul, p.165.]

The ijmaa' that is recorded on these issues became standard practice during the period of the first four caliphs. [62. Hasan, Doctrine, p.164.]

Khallaf is of the view that it is unlikely that ijmaa` could be effectively utilized if it is left to individuals without government intervention. But ijmaa' could be feasible if it were to be facilitated by the authorities which will, for example, specify certain conditions for attainment to the rank of mujtahid. This would enable every government to identify the mujtahidun and to verify their views when the occasion so required When the views of all the mujtahidun throughout the Islamic lands concur upon a ruling concerning an issue, this becomes ijmaa`. [63. Khallaf, `Ilm, pp. 49-50.]

Has the classical definition of ijmaa' ever been fulfilled at any period? Khallaf observes that anyone who scrutinizes events during the period of the companions will note that their ijmaa' consisted of the agreement of the learned among them who were present at the time when an issue was deliberated, and the ruling was a

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[13] [Al-Haj: the Hanbalis didn't understand from Ahmad that he rejected the validity of ijmaa, for he used it and claimed it, but he wanted to exhort caution and verification in the making of such claims, for as Ibn al-Qayyem said, he and others of Ahl-us-Sunnah were afflicted by people like Bishr al-Mareesiy and al-Asamm, who were Mu'tazilah and they would counter the clear text of the sunnah with their claims of ijmaa'. Ibn Taymiyah explains that Ahmad belied the one who claims consensus after the early generations and exhorts them to say instead, I don't know anyone to have disagreed with this. Then, he quotes from al-Qadi Abi Ya'la his saying, "the apparent meaning of this statement is that he (Ahmad) denies the validity of ijmaa', and that is not to be understood this way, but he rather said it out of pious caution, for the possibility that some disagreement didn't reach him. He may have also said it regarding those who have no knowledge of the various positions of as-Salaf (predecessors) for he (Ahmad) made an unqualified statement regarding the validity of ijmaa' in the report of Abdillah [his son] and Abi al-Harith and he himself claimed ijmaa' in al-Hassan ibn Thawaab's report with regard to making takbeer from the morning of the day of 'Arafah till the end of the days of tashreeq." Ibn Taymiyah then said, "What Ahmad denied is the report of consensus by the opponents after the era of sahabah, folllowers and even the followers of the followers. Majmoo' al-Fatawa 19/ 267-268]

collective decision of the shura. There is nothing in the reports to suggest that Abu Bakr postponed the settlement of disputes until a time when all the mujtahidun of the age in different cities reached an agreement. He would instead act on the collective decision of those who were present,[14] and this is what the fuqahaa have referred to as ijmaa`. This form of ijmaa' was only practiced during the period of the Companions, and intermittently under the Umayyads in al-Andalus when in the second Islamic century they set up a council of ulama for consultation in legislative affairs (tashri'). With the exception of these periods in the history of Islam, no collective ijmaa' is known to have taken place. The most that a particular mujtahid was able to say on any particular matter was that `no disagreement is known to exist'. [64. Khallaf, `Ilm, p.50.]

Types of Ijmaa`

From the viewpoint of the manner of its occurrence, ijmaa` is divided into two types:

a. Explicit ijmaa` (al-ijmaa' al-sareeh) in which every mujtahid expresses his opinion either verbally or by an action; and

b. Tacit ijmaa`(al-ijmaa `al-sukuti) whereby some of the mujtahidun of a particular age give an expressed opinion concerning an incident while the rest remain silent.

According to the jumhoor ulama, explicit ijmaa' is definitive and binding.

Tacit ijmaa' is a presumptive ijmaa' which only creates a probability (zann) but does not preclude the possibility of fresh ijtihaad on the same issue.

Since tacit ijmaa` does not imply the definite agreement of all its participants, the ulama have differed over its authority as a proof. The majority of ulama, including al-Shafi'i, have held that it is not a proof and that it does not amount to more than the view of some individual mujtahidun. But the Hanafis have considered tacit ijmaa` to be a proof provided it is established that the mujtahid who has remained silent had known of the opinion of other mujtahidun but then, having had ample time to investigate and to express an opinion, still chose to remain silent. If it is not known that the silence was due to fear or taqiyyah (hiding one's true opinion), or wariness of inviting disfavor and ridicule. [65. Khallaf, `Ilm, p. 51]

The proponents of tacit ijmaa' have further pointed out that explicit agreement or open speech by all the mujtahidun concerning an issue is neither customary nor possible. In every age, it is the usual practice that the leading ulama give an opinion which is often accepted by others. [66. Shawkani, Irshaad, p.72]

Further, the **Hanafis draw a distinction between the `concession' (rukhsah) and 'strict rule' (azimah)**, and consider **tacit ijmaa' to be valid only with regard to the former**.

**The Hanafis are alone in validating tacit ijmaa`**. The Zahiris refuse it altogether, while some Shafi'is like al-Juwayni, al-Ghazali and al-Amidi allow a with certain reservations. 'It is ijmaa`, al-Ghazali tells us,

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[14] [Al-Haj: When something like this happens, and no one who hears of it of the faraway companions was recorded to disagree, then that would provide enough certainty in the ruling reached.]

'provided that the tacit agreement is accompanied by indications of approval on the part of those who are silent.'[15][67. Ghazali, Mustasfa, I, 121]

But despite the controversy it aroused, tacit ijmaa' is by no means an exceptional case; it is suggested that most of what is known by the name of ijmaa' falls under this category.[68. Khallaf, Ilm, p.51.]

Madinese consensus, or ijmaa' ahl al-Madinah.

According to the Maliki ulama, since Madinah was the center of Islamic teaching, the 'abode of hijrah' (dar al-hijrah) and place where most of the Companions resided, the consensus of its people is bound to command high authority. **There is some disagreement among the disciples of Malik** as to the interpretation of the views of their Imam.

- Some observed that Malik had only meant the ijmaa` of the people of Madinah is a proof 'from the viewpoint of narration and factual reporting' (min jihat al-naql wa'l-riwayah) as they were closest to the sources of the Shari'ah.
- Others held that he only meant the Madinese ijmaa' to be preferable but not exclusive.
- Still others said that he had in mind the ijmaa' of the Companions alone.

The proponents of the Madinese ijmaa` quote aHadeeth which include the following: **'Madinah is sacred, and throws out its dross as fire casts out the dross of metal,' and 'Islam will cling to Madinah as a serpent clings to its hole.'** [69. Bukhari, Saheeh (Istanbul edn.), II, 221; Muslim, Saheeh, p.17, Hadeeth no.38; Amidi, Ihkam, I, 243.]

The majority of jurists, however, maintain that these aHadeeth merely speak of the dignity of Madinah and its people. Had the sacred character of a place been a valid criterion, then one might say that the consensus of the people of Mecca would command even greater authority, as Mecca is the most virtuous of cities (afdal al-bilad) according to the nass of the Qur'an. Also, the Prophet said: **'My Companions are like stars. Whomsoever of them that you follow will guide you to the right path.'** This Hadeeth pays no attention whatsoever to the place where a Companion might have resided. [70. Amidi, Ihkam, I, 243ff.] To this analysis, Ibn Hazm adds the point that there were, as we learn from the Qur'an, profligates and transgressors (fussaq wa'l-munafiqun) in Madinah just like other cities. The Companions were knowledgeable in the teachings of the Prophet wherever they were, within or outside Madinah. [71. Ibn Hazm, Ihkam, IV, 155.]

Basis (Sanad) of Ijmaa`

According to the majority if ulama, ijmaa` must be founded in a textual authority or in ijtihaad. Al-Amidi points out that it is unlikely that the ummah might reach unanimity over something that has no foundation in the sources.[72. Amidi, Ihkam, I, 261.]

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[15] [Al-Haj: It is in fact the vast majority of the scholars that consider tacit ijmaa' a hujjah, whether or not they will count it as ijmaa' that imparts positive knowledge. See above my comments in the beginning of the discussion on the proof-value of ijmaa'.]

Can ijmaa' be based on a ruling in the secondary proofs such as qiyas or maslahah.

1. Ijmaa` may not be founded on qiyas, for the simple reason that qiyas itself is subject to a variety of doubts. Since the authority of qiyas as a proof is not a subject on which the ulama are in agreement, how then could ijmaa` be founded on it? It is further noted that the Companions did not reach a consensus on anything without the authority of the Qur'an or the Sunnah. In all cases in which the Companion are known to have reached a consensus, at the root of it there has been some authority in the primary sources.[73. Abu Zahrah, Usul, pp.165-166.]
2. Qiyas in all of its varieties may form the basis of consensus. For qiyas itself consists of an analogy to the nass. Relying on qiyas is therefore equivalent to relying on the nass, and when ijmaa` is based on a qiyas, it relies not on the personal views of the mujtahidun but on the nass of the Shari'ah.
3. When the effective cause (`illah) of qiyas is clearly stated in the nass, or when the 'illah is indisputably obvious, then qiyas may validly form the bases of ijmaa'. But when the 'illah of qiyas is hidden and no clear indication to it can be found in the nusoos, then it cannot form a sound foundation for ijmaa'. [74. Abu Zahrah, Usul, pp.165-166.]

I. **Instances cited of ijmaa` founded upon analogy**:

1. A father is entitled to guardianship over the person and property of his minor child. By analogy, ijmaa' was also established that the grandfather has this right regarding his minor grandchild.
2. A similar example is given regarding the assignment of punishment for wine drinking (shurb). This penalty is fixed at eighty lashes, and an ijmaa' has been claimed in its support. When the Companions were deliberating the issue, `Ali b. Abi Talib drew an analogy between shurb and slanderous accusation (qadhf). Since shurb can lead to qadhf, the prescribed penalty for the latter was, by analogy, assigned to the former. The alleged ijmaa` on this point has, however, been disputed in view of the fact that 'Umar b. al-Khattab determined the hadd of shurb at forty lashes, a position which has been adopted by Ahmad b. Hanbal. To claim an ijmaa' on this point is therefore unwarranted. [Abu Zahrah, Usul, pp.166, 193.]

Transmission of Ijmaa`

From this perspective, ijmaa' is divided into two types, namely **'acquired' (muhassal) and `transmitted' (manqool)**.

'Acquired' (Muhassal)

Concluded with the direct participation of the mujtahid without the mediation of reporters or transmitters. The mujtahid thus gains direct knowledge of the opinions of other mujtahidun when they all reach a consensus on a ruling.

`Transmitted' (Manqool)

Established by means of reports which may either be solitary (ahad) or conclusive (mutawatir). Ijmaa' which is transmitted by tawatur is proven in the same way as acquired ijmaa'. But there is disagreement regarding ijmaa' which is transmitted by way of solitary reports. Al-Ghazali points out that a solitary report is not sufficient to prove

ijmaa', although some fuqahaa have held otherwise. The reason is that ijmaa' is a decisive proof whereas an ahad report amounts to no more than speculative evidence; thus, it cannot establish ijmaa'. [76. Ghazali, Mustasfa, I, 127; Sadr, Ijmaa', pp. 97-98.] Al-Amidi explains that all have nevertheless agreed that anything which is proved by means of a solitary report is speculative of proof (thuboot) even if definitive in respect of content (matn). [77. Amidi, Ihkam, I, 281.]

Proof by means of tawatur can only be claimed for the ijmaa` of the Companions; no other ijmaa' is known to have been transmitted by tawatur. [78. Abu Zahrah, Usul, pp.167-68.]

Reform Proposals

The modern critics of ijmaa' consider that ijmaa' according to its classical definition fails to relate to the search for finding solutions to the problems of the community in modern times. Ijmaa` is hence retrospective and too slow a process to accommodate the problems of social change.

Khallaf was not the first to criticize ijmaa'. An early- critique of ijmaa' was advanced by Shah Wali Allah Dihlawi (d. 1176/1762), who tried to bring ijmaa` closer to reality and came out in support of `relativity' in the concept of ijmaa`. The same author maintains that ijmaa' can be justified on the bases of all such aHadeeth that protect the unity and integrity of the community. But he adds that ijmaa` has never been meant to consist of the universal agreement of every member of the community (or of every learned member of the community for that matter). Ijmaa', according to Shah Wali Allah, is the consensus of the ulama and men of authority in different towns and localities. The ijmaa' of the Companions during the caliphate of Umar b. al-Khattab, and the ijmaa` that was concluded in Mecca and Madinah under the pious caliphs, are all examples of ijmaa` in its relative sense. [16] [79. Shah Wali Allah, Izalah, I, 266.]

Muhammad Iqbaal is primarily concerned with the question of how to utilize the potentials of ijmaa` in the process of modern statutory legislation. `It is strange,' Iqbaal writes, that this important notion 'rarely assumed the form of a permanent institution'. He then suggests that the transfer of the power of ijtihaad `from individual representatives of schools to a Muslim legislative assembly [...] is the only possible form ijmaa` can take in modern times'. [80. Iqbaal, Reconstruction, pp. 173, 174.] In such an assembly, the ulama should play a vital part, but it must also include in its ranks laymen who happen to possess a keen insight into affairs. S. M. Yusuf has observed that Iqbaal was mistaken in trying to convert ijmaa` into a modern legislative institution. Yusuf argues that ijtihaad and ijmaa' have never been the prerogatives of a political organization, and any attempt to institutionalize ijmaa' is

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[16] [Al-Haj: What Khallaf and Dihlawi proposed is subject to discussion, because there may be basis for it in the scholarly views of ijmaa'. However, this ijmaa' shall be about matters of concern for those localities only, and it will benefit in giving certainty and comfort to the authorities and public about the soundness of the decisions made. It shall never be binding in matters of 'ibadah or 'aqeedah, and most certainly, will not be binding on people in other localities. This may be a shade of special ijmaa', but it is not a replacement for the absolute ijmaa's, such as the consensus on the prohibition of co-wifery between a woman and her aunt.]

bound to alter the nature of ijmaa` and defeat its basic purpose. For ijtihaad is a non-transferable right of every competent scholar, and a mujtahid is recognized by the community by virtue of his merits known over a period of time, not through election campaigns or awards of official certificates.

Modern conditions demand that ijtihaad is not exercised in isolation, but collectively. A mujtahid may be expert in Islamic learnings, but he cannot claim to be perfectly acquainted with the social conditions of a country and the diverse nature of its problems. [83. Hasan, Doctrine. p. 244.] Ahmad Hasan goes on to point out that the legislative assembly is `the right place' for the purpose of collective ijtihaad, which would in turn provide an effective method of finding solutions to urgent problems. [84. Hasan, Doctrine. p. 244.] [17]

The late Sheikh of al-Azhar, Mahmud Shaltoot, observes ijmaa', in reality, has often meant either the absence of disagreement (`adam al-ilm bi'l-mukhalif), or the agreement of the majority only (ittifaq al-kathrah). Both of these are acceptable propositions which may form the basis of general legislation. Shaltoot goes on to quote in support the Qur'anic ayah in sura al-Baqarah (2:286) that **`God does not assign to any soul that which falls beyond its capacity**.**'** Shaltoot further adds that since the realization of maslahah through consensus is the objective of ijmaa`, maslahah as bound to vary according to circumstances of time and place. Hence the mujtahidun who participate in ijmaa`, and their successors, should all be able to take into consideration a change of circumstances and it should be possible for them to review a previous ijmaa` if this is deemed to be the only way to realize the maslahah. Should they arrive at a second ijmaa`, this will nullify and replace the first, and constitute a binding authority on all members of the community.[18] [85. Shaltoot, Islam, pp. 558-559.]

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[17] [Al-Haj: Institutionalization of ijmaa' restricts the right of the entire body of 'ulama within a few selected ones. Such a move will have no backing in the adillah shar'iyah at all. Having a counsel of Ahl-ul-hall wa al-'Aqd is paramount, and their decisions in matters of the state must be binding. However, this was the case in some periods of the Islamic history, and they didn't invoke the authority of ijmaa' to its support; moreover, why do we need that body to decide on the nullifiers of wudu', and if it will not, then who will draw the line for its jurisdiction? Moreover, what about the dissent by scholars outside of this body? Where can we find in the proofs of ijmaa' that their voices shall not matter and their dissent will not hurt the consensus. There is already a dynamic for having such a body, which is not contingent upon vesting the authority of ijmaa' on it, and that is the command to obey those in authority amongst us. They have wide powers, even to restrict some of the mubah (permissible) for a greater benefit. If what is meant is the establishment of Fiqh assemblies, that is certainly a valid aspiration, since collective ijtihaad is better than individual one. However, there are a number of those assemblies already present and they, at times, produce variant resolutions. Which of them shall we vest the power of absolute ijmaa' on? And can we do that? It is a good development that we have those assemblies, and their decisions are more likely to be correct, and they provide a much needed assurance to the Muslim public, however, there is no need to invoke the authority of ijmaa' to the aid of this phenomenon, nor is it justified.]

[18] [Al-Haj: If they are judging the same reality, then there is no merit at all to allowing their ijmaa' to abrogate the previous one, lest there would be no meaningful value for ijmaa'. If they were judging different

Conclusion

Under their classical definitions, ijmaa` and ijtihaad were both subject to conditions that virtually drove them into the realm of utopia. The juristic basis for some of the modern reforms introduced in the areas of marriage and divorce, for example, has been sought through novel interpretations of the relevant passages of the Qur'an. Some of these reforms may rightly be regarded as instances of ijtihaad in modern times. Yet in none of these instances do the statutory texts or their explanatory memoranda make an open reference to ijtihaad or ijmaa`.

The classical definitions of ijtihaad and ijmaa` might, at one time, have served the purpose of discouraging excessive diversity which was felt to be threatening the very existence and integrity of the Shari'ah.

Ijtihaad and ijmaa' were brought to a standstill, thanks to the extremely difficult conditions that were imposed on them. Dr Yusuf's criticism of Iqbaal's proposed reform is based on the dubious assumption that an elected legislative assembly will not reflect the collective conscience of the community and will unavoidably be used as an instrument of power politics. If one is to observe the basic message of the textual authority in support of the `ismah of the community, then one must trust the community itself to elect only persons who will honor their collective conscience and their maslahah.[19]

While the taking of every precaution to safeguard the authentic spirit and natural strength of ijmaa` is fully justified, this should not necessarily mean total inertia. The main issue in institutionalizing ijmaa`, as Shaltoot has rightly assessed, is that freedom of opinion should be saved. The consensus that is arrived at in this spirit will have kept a great deal, if not all, of the most valuable features of ijmaa`.[20]

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realities, then the circumstantial component is an integral part of the fatwa, making the subject-matter of the first and second ijmaa's different.]

[19] [AL-Haj: It is rather obvious that many of the callers to reform are influenced by their backgrounds, so they wish to employ ijmaa' towards their biases for what could work best for the ummah, and thus, those with leaning towards democracy, went as far as saying that the ijmaa' should be the right of the masses, and not the scholars. If this is the universal ijmaa', and it is not feasible according to many to establish amongst the scholars, then it is hard to believe that it will be suddenly feasible if we widen the circle to include all people. However, if this is not the universal ijmaa', then a majority will be decisive, and again, it would be unthinkable to have a referendum on a religious ruling where all people are invited to contribute their opinions, mostly founded on anything but true knowledge. If this is a matter of administration and governance that doesn't cross roads with the religion, then whoever said that the power of ijmaa' is needed here; there shall be no harm to decide such a matter on the basis of a numerical majority, but that is obviously isn't what ijmaa' was intended for.]

[20] [Al-Haj: There is no need to invoke the power of ijmaa' in support of those institutions or assemblies. Their resolutions will have greater credibility than individual ijtihaad, but will undoubtedly be short of the ijmaa' that makes other ijtihaads invalid. The majority of scholars in those bodies can't deny the ijtihaad of the other scholars outside of them. There are incidents of ijmaa' that are worthy of the full power and authority of the doctrine, such as the ijmaa' of the companions on some of the issues mentioned by the author and similar incidents.

Likewise is the inability to produce evidence on the presence of a variant opinion in conflict with one transmitted to us, as unanimous, by credible authorities, from the righteous generations.

To negate the authority of this ijmaa' opens all of the gates to utter chaos and makes all of the basic principles liable to reconsideration. This will lead to dismantling the foundations, and instead of recruiting the energies towards true reform, we will be lost into an intellectual wilderness.

At the same time, using ijmaa', when unproven as weapon to stifle legitimate discourse is a practice that deserves to be abandoned. Also, vesting the power of ijmaa' on the agreement of the scholars of one madh-hab or even the four madhahib is a departure from the correct understanding or this doctrine, and would have no backing in the revelation whatsoever.]

Chapter Nine: Qiyas (Analogical Deduction)

[Definition]

Literally, qiyas means measuring or ascertaining the length, weight, or quality of something, which is why scales are called miqyas. Thus the Arabic expression, qasat al-thawb bil-dhira' means that `the cloth was measured by the yardstick'. [1. Amidi, Ihkam, III, 183.]

Qiyas also means comparison, with a view to suggesting equality or similarity between two things. Thus the expression Zayd yuqas ila Khalid fi `aqlihi wa nasabih means that `Zayd compares with Khalid in intelligence and descent'. [2. Ghazali, Mustasfa, II, 54.]

Qiyas thus suggests an equality or close similarity between two things, one of which is taken as the criterion for evaluating the other.

Technically, qiyas is the **extension of a Shari'ah value from an original case, or asl, to a new case, because the latter has the same effective cause as the former**. The original case is regulated by a given text, and qiyas seeks to extend the same textual ruling to the new case. [3. Shawkani, Irshaad, p. 198.]

A recourse to analogy is only warranted if the solution of a new case cannot be found in the Qur'an, the Sunnah or a definite ijmaa`. [4. Cf. Abdur Rahim, Jurisprudence, p.137.]

Analogical deduction is different from interpretation in that the former is primarily concerned with the extension of the rationale of a given text to cases which may not fall within the terms of its language. Qiyas is thus a step beyond the scope of interpretation.

The emphasis in qiyas is clearly placed on the identification of a common cause between two cases which is not indicated in the language of the text. **Identifying the effective cause often involves intellectual exertion** on the part of the jurist, who determines it by rec**ourse not only to the semantics of a given text but also to his understanding of the general objectives** of the law.

Although qiyas offers considerable potential for creativity and enrichment, **it is basically designed to ensure conformity with the letter and the spirit of the Qur'an and the Sunnah**. In this sense, it is perhaps **less than justified to call qiyas one of the sources (masadir) of the Shari'ah; it is rather a proof (hujjah) or an evidence (daleel)** whose primary aim is to ensure consistency between revelation and reason in the development of the Shari'ah.

Qiyas is admittedly a rationalist doctrine, but it is one in which the use of personal opinion (ra'y) is subservient to the terms of the divine revelation.

The jurist who resorts to qiyas takes it for granted that the rules of Shari'ah follow certain objectives (maqasid) which are in harmony with reason. A rational approach to the discovery and identification of the objectives and intentions of the Lawgiver necessitates recourse to human intellect and judgment in the evaluation of the ahkaam.

It is precisely on this ground, namely the propriety or otherwise of adopting an inquisitive approach to the injunctions of the Lawgiver, referred to as ta'leel, that qiyas has come under attack by the Mu'tazilah, the Zahiri,

the Shi'i and some Hanbali ulama. Their argument is that the law must be based on certainty, whereas qiyas is largely speculative and superfluous. If the two cases are identical and the law is clearly laid down in regard to one, there is no case for qiyas, as both will be covered by the same law. If they are different but bear a similarity to one another, then it is impossible to know whether the Lawgiver had intended the subsidiary case to be governed by the law of the original case.

It is once again in recognition of this element of uncertainty in qiyas that **the ulama of all the juristic schools have ranked qiyas as a 'speculative evidence'**. With the **exception**, **perhaps**, **of one variety** of qiyas, **namely where the 'illah of qiyas is clearly identified in the text**, qiyas in general can never be as high an authority as the nass or a definite ijmaa', for these are decisive evidences (adillah qat'iyyah), whereas qiyas in most cases only amounts to a probability.[21]

[Never Independent of Nass]

In our discussion of the methodology of qiyas it will at once become obvious that the whole purpose of this methodology is to ensure that under no circumstances does analogical deduction operate independently of the nusoos. It would be useful to start by giving a few examples.

1) The Qur'an (al-Jumu'ah, 62:9) forbids selling or buying goods after the last call for Friday prayer until the end of the prayer. By analogy this prohibition is extended to all kinds of transactions, since the effective cause, that is, diversion from prayer, is common to all. [5. Khallaf, `Ilm, p.52, Abdur Rahim, Jurisprudence, p. 138.]

2) The Prophet is reported to have said, 'The killer shall not inherit [from his victim]' By analogy this ruling is extended to bequests, which would mean that the killer cannot benefit from the will of his victim either. [6. Ibn Qayyim, I'lam, II, 242; Khallaf, `Ilm, p.53.]

3) According to a Hadeeth, it is forbidden for a man to make an offer of betrothal to a woman who is already betrothed to another man unless the latter permits it or has totally abandoned his offer. The 'illah of this rule is to obviate conflict and hostility among people. By analogy the same rule is extended to all other transactions in which the same `illah is found to be operative. [7. Abu Dawood Sunan (Hasan's trans.) II, 556, Hadeeth no. 2075; Tabrizi, Mishkaat, II, 940, Hadeeth no.3144; Musa, Ahkaam, p. 45.]

[Hanafi Vs. Majority Definition and Scope]

The majority of ulama have defined qiyas as the application to a new case (far'), on which the law is silent, of the ruling (hukm) of an original case (asl) because of the effective cause ('illah) which is in common to both. [8. Amidi, Ihkam, III, 186.]

The Hanafi definition of qiyas is substantially the same, albeit with a minor addition which is designed to preclude certain varieties of qiyas (such as qiyas al-awla and qiyas al-musawi, [q.v,]) from the scope of qiyas. The Hanafi jurist, Sadr al-Shari'ah, in his Tawdeeh, as translated by Aghnides, defines qiyas as `extending the (Shari'ah)

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[21] [Al-Haj: By the consensus of the companions and ample evidence in the revelation, we are required to act upon probability, since certainty is impossible to attain on most matters. The sahabah agreed on accepting solitary reports, and they are certainly uncertain.]

value from the original case over to the subsidiary (far`) by reason of an effective cause which is common to both cases and cannot be understood from the expression (concerning the original case) alone.' [9. `Ubaydullah ibn Mas'ud Sadr al-Shari'ah, al-Tawdeeh fi Hall Ghawamid al-Tanqeeh, p. 444; Aghnides, Muhammedan Theories, p. 49.]

The essential requirements of qiyas

1) The original case, or asl, on which a ruling is given in the text and which analogy seeks to extend to a new case.

2) The new case (far`) on which a ruling is wanting.

3) The effective cause (`illah) which is an attribute (wasf) of the asl and is found to be in common between the original and the new case.

4) The rule (hukm) governing the original case which is to be extended to the new case.

To illustrate these, we might adduce the example of the Qur'an (al-Ma'idah, 5:90), which explicitly forbids wine drinking. If this prohibition is to be extended by analogy to narcotic drugs, the four pillars of analogy in this example would be: asl far` `Illah hukm wine drinking taking drugs the intoxicating effect prohibition

Each of the four essentials (Arkaan) of analogy must, in turn, qualify a number of other conditions which are all designed to ensure propriety and accuracy in the application of qiyas. It is to these which we now turn.

Conditions Pertaining to the Original Case (Asl)

Asl has two meanings. Firstly, it refers to the **source**, such as the **Qur'an or the Sunnah**, which reveals a particular ruling. The second meaning of asl is the **subject-matter** of that ruling. In the foregoing example of the prohibition of wine in the Qur'an, the asl is both the Qur'an, which is the source, and wine, which is the original case or the subject-matter of the prohibition. [11. Shawkani, Irshaad, pp.204-205; Abu Zahrah, Usul, p. 180.]

Does ijmaa `constitute a valid asl for qiyas?

Those who dispute the validity of ijmaa' as a basis of analogical deduction argue that ijmaa' does not always explain its own justification or rationale. [13. Khallaf,`Ilm, p.53, Shawkani, Irshad,p.210.] **But this view is based on the assumption that the `illah of qiyas is always identified in the sources**, which is not the case. Furthermore, the majority view which validates the founding of analogy on ijmaa` maintains that consensus itself is a basis (sanad) and that the effective cause of a ruling which is based on consensus can be identified through ijtihaad. [14. Abu Zahrah, Usul, p.128.]

Majority: one qiyas may not constitute the asl of another.

If the **effective cause**, on which the second analogy is founded, **is identical with the original `illah**, then the **whole exercise would be superfluous**. For instance, if it be admitted that the quality of edibility is the effective cause which would bring an article within the scope of usury (riba) then it would justify an analogy to be drawn between wheat and rice. But an attempt to draw a second analogy between rice and edible oil would be unnecessary, for it would be preferable to draw a direct analogy between wheat and edible oil.[15. Ghazali, Mustasfa, II, 87; Shawkani, Irshaad, p 205.]

However, according to the prominent Maliki jurist, **Ibn Rushd** (whose views are here **representative of the Maliki school**) and **some Hanbali** ulama, **one qiyas may constitute the asl of another**: when one qiyas is founded on another qiyas, the far' of the second becomes an independent asl from which a different 'illah may be deduced. This process may continue ad infinitum with the only proviso being that in cases where an analogy can be founded in the Qur'an, recourse may not be had to another qiyas. [16. Ibn Rushd, Bidayah, I, 4-5: Abu Zahrah, Usul, p. 183; Nour, `Qiyas', 29.] But **al-Ghazali rejects the proposition of one qiyas forming the asl of another** altogether. He compares this to the work of a person who tries to find pebbles on the beach that look alike. Finding one that resembles the original, he then throws away the original and tries to find one similar to the second, and so on. By the time he finds the tenth, it would not be surprising if it turned out to be totally different from the first in the series. Thus, for al-Ghazali, qiyas founded on another qiyas is like speculation built upon speculation, and the further it continues along the line, the more real becomes the possibility of error. [17. Ghazali, Mustasfa, II, 87.]

Conditions Pertaining to the Hukm

A hukm is a ruling, such as a command or a prohibition, which is dispensed by the Qur'an, the Sunnah or ijmaa', and analogy seeks its extension to a new case.

In order to constitute the valid basis of an analogy, the **hukm must fulfill the following conditions**.

1) It must be a practical shar`i ruling, for qiyas is only operative in regard to practical matters inasmuch as this is the case with fiqh as a whole. Qiyas can only be attempted when there is a hukm available in the sources. In the event where no hukm can be found in any of the three sources regarding a case, and its legality is determined with reference to a general maxim such as original freedom from liability (albara'ah al-asliyyah), no hukm could be said to exist. Original freedom from liability is not regarded as a hukm shar`i and may not therefore form the basis of qiyas. [20. Shawkani, Irshaad, p. 205; Khudari, Usul, p. 295]

2) The hukm must be operative, which means that it **has not been abrogated**. Similarly, the validity of hukm which is sought to be extended by analogy must **not be the subject of disagreement** and controversy. [21. Amidi, Ihkam, III, 196-97.]

3) The hukm must be rational in the sense that the human intellect is capable of understanding the reason or the cause of its enactment. For example, the effective cause of prohibitions such as those issued against gambling and misappropriating the property of another is easily discernable. But when a hukm cannot be so understood, as in the case of the number of prostrations in salah, it may not form the basis of analogical deduction. Ritual performances, or `ibadat, on the whole, are not the proper subject of qiyas.

According to Imam Abu Hanifah, **who represents the majority**, all the nusoos of Shari'ah are rational except where it is indicated that they fall under the rubric of `ibadat.

The Zahiris, **and 'Uthman al-Batti**, a contemporary of Abu Hanifah have, on the other hand, held that the effective causes of the nusoos cannot be ascertained without an indication in the nusoos themselves. [22. Abu Zahrah, Usul, p. 185; Khallaf, 'Ilm, pp. 61-62.] **'We do not deny,' writes Ibn Hazm**, **'that God has assigned certain causes to some of His laws**, **but** we say this only when there is a nass to confirm it.' He then goes on to

quote a Hadeeth of the Prophet to the effect that **'the greatest wrong-doer in Islam is one who asks about something, which is not forbidden, and it is then forbidden because of his questioning'**. Ibn Hazm continues: we firmly deny that all the ahkaam of Shari'ah can be explained and rationalized in terms of causes. Almighty God enacts a law as He wills. The question of `how and why' does not and must not be applied to His will. Hence it is improper for anyone to enquire, in the absence of a clear text, into the causes of divine laws. Anyone who poses questions and searches for the causes of God's injunctions 'defies Almighty God and commits a transgression'. [23. Ibn Hazm, Ihkam, VIII, 102; Muslim, Saheeh Muslim, I, 423, Hadeeth no, 1599.] For he would be acting contrary to the purport of the Qur'an where God describes Himself, saying, **'He cannot be questioned for His acts, but they will be questioned for theirs'** (al-Anbiya', 21:21). It is thus known, Ibn Hazm concludes, that causes of any kind are nullified from the acts and words of God. For justification and ta'leel is the work of one who is weak and compelled (mudtarr), and God is above all this. [24. Ibn Hazm, Ihkam, VIII, 103.]

The Muslim jurists, like other believing Muslims, have shown a natural reluctance to be too presumptuous in their efforts to identify the causes of the divine laws. But the Issue does not pose itself in the same way regarding secular or man-made law. As such, analogical deduction in the context of modern law is a relatively easier proposition. But there are certain restrictions which discourage a liberal recourse to analogy even in modern law. For one thing, the operation of analogy in modern law is confined to civil law, as in the area of crimes the constitutional principle of legality discourages the analogical extension of the text. It should be further noted that owing to extensive reliance on statutory legislation, there is no crime and no punishment in the absence of a statutory text which clearly defines the offence or the penalty in question. It will thus be noted that the need for recourse to analogy has been proportionately diminished. **This would in turn explain why qiyas tends to play a more prominent role in the Shari'ah than in modern law**.

4) The fourth requirement concerning the hukm is that it must not be confined to an exceptional situation or to a particular state of affairs. Thus when the Prophet admitted the testimony of Khuzaymah alone to be equivalent to that of two witnesses, he did so by way of an exception. The precedent in this case is therefore not extendable by analogy. [26. The relevant Hadeeth reads: 'If Khuzaymah testifies for anyone, that is sufficient as a proof.' Ghazali, Mustasfa; II, 88; Abu Dawood, Sunan, III, 1024, Hadeeth no.3600.]

5) And lastly, the law of the text must not represent a departure from the general rules of qiyas in the first place. For example, traveling during Ramadan is the cause of a concession which exonerates the traveler from the duty of fasting. The concession is an exception to the general rule which requires everyone to observe the fast. It may therefore not form the basis of an analogy in regard to other types of hardship. Similarly the concession granted in wudu' (ablution) in regard to wiping over boots represents a departure from the general rule which requires washing the feet. The exception in this case is not extendable by way of analogy to similar cases such as socks. But according to the Shafi'is, when the 'illah of a ruling can be clearly identified, analogy may be based on it even if the ruling was exceptional in the first place. For example, the transaction of 'araya, or the sale of fresh dates on the tree in exchange for dry dates, is exceptionally permitted by a Hadeeth notwithstanding the

somewhat usurious nature of this transaction; the rules of riba forbidding exchange of identical commodities of unequal quantity. The 'illah of this permissibility is to fulfill the need of the owner of unripe dates for the dried variety. By way of analogy, the Shafi'is have validated the exchange of grapes for raisins on the basis of a similar need. [27. Muslim, Saheeh Muslim, p. 247, Hadeeth no. 920; Sha`ban, Usul, p 130.]

III. The New Case (Far')

The far' is an incident or a case whose ruling is sought by recourse to analogy.

The far` must fulfill the following three conditions.

1) **The new case must not be covered by the text or ijmaa`**. For in the presence of a ruling in these sources, there will be no need for a recourse to qiyas. However, some Hanafi and Maliki jurists have at times resorted to qiyas even in cases where a ruling could be found in the sources. But they have done so only where the ruling in question was of a speculative type, such as a solitary Hadeeth. We shall have occasion to elaborate on this point later.

2) **The effective cause of analogy must be applicable to the new case in the same way as to the original case**. Should there be no uniformity, or substantial equality between them, the analogy is technically called qiyas ma'al-fariq, or `qiyas with a discrepancy', which is invalid. If, for example, the `illah in the prohibition of wine is intoxication then a beverage which only causes a lapse of memory would differ with wine in respect of the application of 'illah, and this would render the analogy invalid. [28. Shawkani, Irshaad, p. 209.]

3) **The application of qiyas to a new case must not result in altering the law of the text**, for this would mean overruling the text by means of qiyas which is ultra vires. An example of this is the case of false accusation (qadhf) which by an express nass (sura al-Noor, 24:4) constitutes a permanent bar to the acceptance of one's testimony. Al-Shafi`i has, however, drawn an analogy between false accusation and other grave sins (kaba'ir): a person who is punished for a grave sin may be heard as a witness after repentance. In the case of false accusation, too, repentance should remove the bar to the admission of testimony. To this the Hanafis have replied that an analogy of this kind would overrule the law of the text which forever proscribes the testimony of a false accuser. [30. Aghnides, Muhammedan Theories, p.62.]

IV. The Effective Cause ('Illah)

This is perhaps the most important of all the requirements of qiyas. `Illah has been variously defined by the ulama of usul. According to the majority, it is an **attribute of the asl which is constant and evident and bears a proper (munasib) relationship to the law of the text (hukm)**. In the works of usul, the `illah is alternatively referred to as **manaat al-hukm** (i.e. the cause of the hukm), the sign of the hukm (**amarah al-hukm**), and **sabab**. [32.Shawkani, Irshaad, p. 207; Abu Zahrah, Usul, p. 188.]

Some ulama have attached numerous conditions to the 'illah, but most of these are controversial and may be summarized in the following five. [33. Note, for example, Shawkani, (Irshaad, p. 207-208) who has listed 24 conditions for the 'illah whereas the Maliki jurist, Ibn al-Hajib has recorded only eleven.]

1) **According to the majority, the `illah must be a constant attribute (mundabit)** which is applicable to all cases without being affected by differences of persons, time, place and circumstances. The Malikis and the

Hanbalis, however, do not agree to this requirement as they maintain that the `illah need not be constant, and that it is sufficient if the 'illah bears a proper or reasonable relationship to the hukm. The difference between the two views is that the majority distinguish the effective cause from the objective (hikmah) of the law and preclude the latter from the scope of the `illah. [34. Khallaf, `Ilm, 64; Abu Zahrah, Usul, p. 188.] The `illah is constant if it applies to all cases regardless of circumstantial changes. To give an example, according to the rules of pre-emption (shuf`a) the joint, or the neighbouring, owner of a real property has priority in buying the property whenever his partner or his neighbor wishes to sell it. The `illah in preemption is joint ownership itself, whereas the hikmah of this rule is to protect the partner/neighbor against a possible harm. Now the harm may materialise, or it may not. As such, the hikmah is not constant. A hukm shar'i is present whenever its `illah is present even if its hikmah is not, and a hukm shar`i is absent in the absence of its 'illah even if its hikmah is present. [35. Shawkani, Irshaad, pp. 207-208, Khallaf, Ilm, pp.88-97.] The Malikis and the Hanbalis, on the other hand, do not draw any distinction between the 'illah and the hikmah. In their view, the hikmah aims at attracting an evident benefit or preventing an evident harm, and this is the ultimate objective of the law. Since the realization of benefit (maslahah) and prevention of harm (mafsadah) is the basic purpose of all the rules of Shari'ah, it would be proper to base analogy on the hikmah. [36. Abu Zahrah, Usul, p. 188.] The Hanafis and the Shafi'is however maintain that the `illah must be both evident and constant. Their objection to the hikmah being the basis of analogy is that the hikmah of the law is often a hidden quality. The hikmah is also variable according to circumstances, and this adds further to the difficulty of basing analogy on it. The hikmah, in other words, is neither constant nor well-defined. To give an example, the permission granted to travelers to break the fast while traveling is to relieve them from hardship. This is the hikmah of this ruling. But since hardship is a hidden phenomenon and often varies according to persons and circumstances, it may not constitute the effective cause of an analogy. The concession is therefore attached to traveling itself which is the `illah regardless of the degree of hardship that it may cause to individual travelers. [37. Khallaf, `Ilm, p.64.] To give another example, the 'illah in the prohibition of passing a red traffic light is the appearance of the red light itself. The hikmah is to prevent traffic irregularities and accidents. Anyone who passes a red light is committing an offence even if no accident is caused as a result.

2) As already stated, the effective cause on which analogy is based must also be evident (zahir). Hidden phenomena such as intention, goodwill, consent, etc., which are not clearly ascertainable may not constitute the `illah of analogy. The general rule is that the `illah must be definite and perceptible to the senses. For example, since the consent of parties to a contract is imperceptible in its nature, the law proceeds upon the act of offer and acceptance.

3) The third condition of 'illah is that it must be a proper attribute (al-wasf al-munasib) in that it bears a proper and reasonable relationship to the law of the text (hukm). This relationship is munasib when it serves to achieve the objective (hikmah) of the Lawgiver, which is to benefit the people and to protect them against harm. For example, the intoxicating effect of wine is the proper cause of its prohibition not its color or taste. An attribute which does not bear a proper relationship to the hukm does not qualify as an 'illah. To give an example, murder must be retaliated for, not because the perpetrator happens to be a Negro or an Arab, but because he has deliberately killed another. [39. Abu Zahrah, Usul, p. 189; Khallaf, `Ilm, pp. 69-70.]

4) The `illah must be 'transient' (muta'addi)**, that is, an objective quality which is transferable to other cases. As the Hanafis explain, the very essence of 'illah, as much as that of qiyas in general, is its capability of extension to new cases. Traveling, for example, is the `illah of a concession in connection with fasting. As such, it is an 'illah which is confined to the asl and cannot be applied in the same way to other devotional acts (ibadat). **Transferability (ta'diyah) of the effective cause is not, however, required by the Shafi'is, who have validated qiyas on the basis of an `illah which is confined to the original case (i.e. 'illah qasirah).[22] The Shafi'is (and the Hanafi jurist, Ibn al-Humam) have argued that ta'diyah is not a requirement of the 'illah: the utility of the `illah is not to be sought solely in its transferability. The ulama are, however, in agreement that the textually prescribed causes must be accepted as they are regardless as to whether they are inherently transient or not. The requirement of ta`diyah would imply that the `illah of analogy must be an abstract quality and not a concrete activity or object. To illustrate this, we may again refer to the foregoing examples. Traveling, which is a concession in connection with fasting, is a concrete activity, whereas intoxication is an abstract quality which is not confined in its application. [40. Ghazali, Mustasfa, II, 98; Khudari, Usul, p. 320.]

5) And finally, the effective cause must not be an attribute which runs counter to, or seeks to alter, the law of the text. To illustrate this we may refer to the story of a judge, Imam Yahya of al-Andalus, who was asked by an Abbasid ruler as to the penance (kaffarah) of having conjugal relations during daytime in Ramadan. The judge responded that the kaffarah in this case was sixty days of fasting. This answer was incorrect as it sought to introduce a change in the text of the Hadeeth which enacted the kaffarah to be freeing a slave, or sixty days of fasting, or feeding sixty poor persons. The fatwa given by the judge sought to change this order of priority on the dubious assumption that freeing a slave (or feeding sixty persons) was an easy matter for a ruler and he should therefore be required to observe the fasting only. [41. Abu Zahrah, Usul, pp. 187, 190, 194.]

Identification of the 'Illah

The effective cause of a ruling may be **clearly stated, or suggested** by indications in the nass, **or** it may be **determined by consensus**.

Differences of opinion arise only in cases where the 'illah is not identified in the sources.

An example of the 'illah which is expressly stated

An example of the 'illah which is expressly stated in the text occurs in sura al-Nisa (4:43): 'O you believers! Do not approach salah while you are drunk.' This ayah was revealed prior to the general prohibition of wine-

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[22] [Al-Haj: There is an agreement that the confined ‘illah shall not be used in analogy, because it is impossible, since the essence of Qiyas is to extend the ruling from the original case to the new one because they share the same effective cause. If the effective cause is confined to the original, then it is not conceivable that there could be analogy. The Shafi’is, as well as the Malikis, and in fact the majority of Hanbalis, and the position chosen by Ibn Taymiyah is that the confined cause (‘illah qasirah) is suitable for ta’leel (ratiocination), not analogy. Thus, you may use it to further elucidate the hikmah. The Hanafis would argue that it may not be even mentioned in that context.]

drinking in sura al-Ma'idah (5:93), but it provides, nevertheless, a clear reference to intoxication, which is also confirmed by the Hadeeth 'every intoxicant is khamr [wine] and every khamr is forbidden'. [42. Abu Dawood, Sunan, III, 1043, Hadeeth no. 3672.]

Instances are also found in the Hadeeth where the text itself identifies the rationale of its ruling. Thus the effective cause of asking for permission when entering a private dwelling is stated in the Hadeeth which provides that 'permission is required because of viewing'. The 'illah of asking for permission is thus to protect the privacy of the home against unsolicited viewing. [43. Muslim, Saheeh, p. 375, Hadeeth no. 1424; Ghazali, Mustasfa, II, 74; Ibn Hazm, Ihkam.]

In these examples, the occurrence of certain Arabic expressions such as kay-la (so as not to), li-ajli (because of), etc., are associated with the concept of ratiocination (ta'leel) and provide definite indications as to the `illah of a given ruling.

Alternatively, the text which indicates the `illah may be a manifest nass (al-nass al-zahir)

Which is in the nature of a probability or an allusion (al-ima' wa'l-isharah). For example, in the Qur'anic text (al-Ma'idah, 5:38): `as to the thieves, male and female, cut off [fa'qta'u] their hands,' theft itself is the cause of the punishment.

In sura al-Nisa' (4:34) we find another example, as follows: `As for women whose rebellion [nushooz] you fear, admonish them (fa-`izzuhunna) and leave them alone in their beds, and physically punish them.' In this text, nushooz is the effective cause of the punishment.[45. Imam Malik has by analogy extended the same penalties to a husband who ill-treats his wife. He must first be admonished; if he continues, he must continue paying the wife her maintenance but she is not required to obey him; finally he may be subjected to physical punishment. See Abu Zahrah, Usul, p.193.]

And lastly, in the Hadeeth which provides that `the judge who is in a state of anger may not adjudicate,' anger itself is the `illah of the prohibition. [47. Abu Dawood, Sunan, III, 1018, Hadeeth no 3582; Ghazali, Mustasfa, II, 75; Shawkani, Irshaad, pp. 210, 212.] By analogy, the Companions have extended the ruling of this Hadeeth to anything which resembles anger in its effect such as extreme hunger and depression. [48. Sha`ban, Usul, p. 151.]

II. Sometimes the word sabab is used as a substitute for 'illah.

Although sabab is synonymous with `illah and many writers have used them as such, nevertheless, **sabab is normally reserved for devotional acts (ibadat)** whose rationale is not perceptible to the human intellect.

The text may sometimes provide an indication as to its sabab. Thus we find in sura al-Isra' (17:78) which enjoins, **`Perform the salah from the decline of the sun [li-dulook al-shams] until twilight at night,'** the sabab (cause) of salah is the time when the salah is due. Since the cause of the ruling in this text is not discernable to human intellect, it is referred to as a sabab but not as an 'illah. From this distinction, it would appear that every 'illah is [49 . Khallaf, `Ilm, pp. 67-68.]concurrently a sabab, but not every sabab is necessarily an 'illah.

Next, the effective cause of a ruling may be established by consensus.

An example of this is the priority of germane over consanguine brothers in inheritance, the 'illah for which is held to be the former's superior tie with the mother. This ruling of ijmaa' has subsequently formed the basis of an analogy according to which the germane brother is also given priority over the consanguine brother in respect of guardianship (wilayah).

['Illah Identified Through Ijtihaad]

When the 'illah is neither stated nor alluded to in the text, then the only way to identify it is through ijtihaad. The jurist thus takes into consideration the attributes of the original case, and only that attribute which is considered to be proper (munasib) is identified as the 'illah.

For example, in the Hadeeth referred to above concerning the penance of conjugal relations during daytime in Ramadan, it is not precisely known whether the 'illah of the penance is the breaking of the fast (iftaar), or sexual intercourse. [52. Ghazali, Mustasfa, II, 54; Abu Zahrah, Usul, p. 194.]

The method of reasoning which the mujtahid employs in such cases is called Tanqeeh al-manaat, or isolating the 'illah, which is to be distinguished from two other methods referred to as takhrij al-manaat (extracting the 'illah) and Tahqeeq al-manaat (ascertaining the 'illah) respectively. This process of enquiry is roughly equivalent to what is referred to by some ulama of usul as al-sabr wa'l-taqseem, or elimination of the improper and assignment of the proper 'illah to the hukm.

Tanqeeh al-manaat implies that a ruling may have more than one cause, and the mujtahid has to identify the one that is proper (munasib), as was the case in the foregoing examples. Literally, Tanqeeh, means 'purifying', whereas manaat is another word for 'illah. Technically, Tanqeeh al-manaat means 'connecting the new case to the original case by eliminating the discrepancy between them' (ilhaaq al-far' bi'l-asl biilgha' al-fariq). [53. Shawkani, Irshaad, pp. 221-22]

Extracting the `illah, or takhrij al-manaat, is in fact the starting point to the enquiry concerning the identification of 'illah, the jurist extracts it by looking at the relevant causes. He may identify more than one cause, in which case he has completed the step involved in takhrij al-manaat and must move on to the next stage, which is to isolate the proper cause. To illustrate this, the prohibition of usury (riba) in wheat and five other articles is laid down in the Hadeeth. When the jurist seeks to draw an analogy between wheat and raisins-to determine for example whether one should apply the tax of one tenth by analogy to raisins-the 'illah may be any of the following: that both of them sustain life, that they are edible, that they are both grown in the soil, or that they are sold by measure. Thus far the jurist has completed the first step, namely extracting the `illah. But then he proceeds to eliminate some of these by recourse to Tanqeeh al-manaat. The first `illah is eliminated because salt, which is one of the six articles, does not sustain life; the second is also eliminated because gold and silver are not edible; and so is the third as neither salt nor precious metals are grown in the soil. The `illah is therefore the last attribute, which comprises all the specified items in the Hadeeth of riba.

**Ascertaining the `illah, or Tahqeeq al-manaat,** follows the two preceding stages of investigation in that it consists of ascertaining the presence of an `illah in individual cases. For purposes of drawing an analogy between wine and a herbal drink, for example, the investigation which leads to the conclusion that the substance in

question has the intoxicating quality in common with wine is in the nature of Tahqeeq al-manaat. [55. For other examples see Shawkani, Irshaad, p. 222.].

Varieties of Qiyas

From the viewpoint of the strength or weakness of the 'illah, the Shafi'i jurists have divided qiyas into three types:

'Analogy of the Superior' (qiyas al-awla).

The effective cause in this qiyas is more evident in the new case than the original. For example, we may refer to the Qur'anic text in sura al-Isra' (17:23) which provides regarding parents: 'say not to them uff [i.e. a single word of contempt] nor repel them, but address them in dignified terms'. By analogy it may be deduced that the prohibition against lashing or beating them is even more obvious than verbal abuse.

'Analogy of Equals' (qiyas al-musawi).

The 'illah in this type of qiyas is equally effective in both the new and the original cases. We may illustrate this by reference to the Qur'an (al-Nisa', 4:2) which forbids 'devouring the property of orphans'. By analogy, it is concluded that all other forms of destruction and mismanagement which lead to the loss of such property are equally forbidden. But this is once again regarded by the Hanafis to fall within the scope of interpretation rather than analogy. To give another example, according to a Hadeeth, a container which is licked by a dog must be washed seven times. The Shafi'is extend the same ruling by analogy to a container which is licked by swine. The Hanafis, however, do not allow this Hadeeth in the first place. [57. Muslim, Saheeh Muslim, p. 41, Hadeeth no. 119; Ibn Hazm, Ihkam, VII, 54-55; Abu Zahrah.]

'Analogy of the Inferior' (qiyas al-adna).

The effective cause in this form of qiyas is less clearly effective in the new case. Hence it is not obvious whether the new case falls under the same ruling. For example, the rules of riba, prohibit the exchange of wheat and of other specified commodities unless the two amounts are equal and delivery is immediate. By analogy this rule is extended to apples, since both wheat and apples are edible (according to Shafi'i) and measurable (according to Hanafi) jurists. But the `illah of this qiyas is weaker in regard to apples which, unlike wheat, are not a staple food. [57. Muslim, Saheeh Muslim, p. 41, Hadeeth no. 119; Ibn Hazm, Ihkam, VII, 54-55; Abu Zahrah, Usul, p.195-196.] This type of qiyas is unanimously accepted as qiyas proper, but, as earlier stated, the Hanafis and some Zahiris consider the first two varieties to fall within the meaning of the text. It would appear that the Hanafis apply the term 'qiyas' only to that deduction which involves ijtihaad. [58. Zuhayr, Usul, IV, 45.]

Obvious and Hidden Qiyas

Qiyas has been further divided into two types, namely 'obvious analogy' (qiyas jaliy) and `hidden analogy' (qiyas khafiy). This is mainly a Hanafi division.

'Obvious Analogy' (Qiyas Jaliy)

In the former, the equation between the asl and far` is obvious and the discrepancy between them is removed by clear evidence. An example of this is the equation the ulama have drawn between the male and the female slave with regard to the rules of manumission. Thus if two persons, jointly own a slave and one of them sets

the slave free to the extent of his own share, it is the duty of the Imam to pay the other part-owner his share and release the slave. This ruling is explicit regarding the male slave, but by an `obvious analogy' the same rule is applied to the female slave. The discrepancy of gender in this case is of no consequence. [59. Ibn Qayyim, I'lam, I, 178.]

Hidden Analogy' (Qiyas Khafiy)

The 'hidden analogy' (qiyas khafiy) differs from the 'obvious' variety in that the removal of discrepancy between the asl and the far` is by means of a probability (zann). Shawkani illustrates this with a reference to the two varieties of wine, namely nabeedh, and khamr. The former is obtained from dates and the latter from grapes. The rule of prohibition is analogically extended to nabeedh despite some discrepancy that might exist between the two. [60. Shawkani, Irshaad, 222; Ibn Qayyim, I'lam, I, 178.] Another example of qiyas khafiy is the extension, by the majority of ulama (excepting the Hanafis), of the prescribed penalty of zina to sodomy, despite a measure of discrepancy that is known to exist between the two cases. And finally, the foregoing analysis would suggest that qiyas khafiy and qiyas al-adna are substantially concurrent.

Proof (Hujjiyyah) of Qiyas

Notwithstanding the absence of a clear authority for qiyas in the Qur'an, the ulama of the four Sunni schools and the Zaydi Shi'ah have validated qiyas. A reference is made to sura al-Nisa' (4:59) which reads, in an address to the believers: **`should you dispute over something**, **refer it to God and to the Messenger**, **if you do believe in God'**. The proponents of qiyas reasoned that a dispute can only be referred to God and to the Prophet by following the signs and indications we find in the Qur'an and Sunnah. [61. Ibn Qayyim, I'lam, I, 197; Khallaf, 'Ilm, p.54.]

The Qur'an often indicates the rationale of its laws. The rationale of retaliation, for example, is to protect life, and this is clearly stated in the text (al-Baqarah. 2:79). Likewise, the rationale of zakah is to prevent the concentration of wealth in a few hands, which is clearly stated in the Qur'an (al-Hashr, 59:7). It is thus concluded that the indication of causes and objectives, similitudes and contrasts, would be meaningless if they were not observed and followed as a guide for conduct in the determination of the ahkaam [63. Abu Zahrah, Usul, p. 176.].

There are two types of indication in the Sunnah to which the proponents of qiyas referred:

1) **Qiyas is a form of ijtihaad**, **which is expressly validated in the Hadeeth of Mu`adh b**. **Jabal**. It is reported that the Prophet asked Mu`adh upon the latter's departure as judge to the Yemen, questions in answer to which Mu`adh told the Prophet that he would resort to his own ijtihaad in the event that he failed to find guidance in the Qur'an and the Sunnah, and the Prophet was pleased with this reply. Since the Hadeeth does not specify any form of reasoning in particular, analogical reasoning falls within the meaning of this Hadeeth.[64. Abu Dawood, Sunan (Hasan's trans.) III, 109 (Hadeeth 1038), Khallaf, `Ilm, p.56.]

2) **The Sunnah provides evidence that the Prophet resorted to analogical reasoning** on occasions when he did not receive a revelation on a particular matter. On one such occasion, a woman known as al-Khath'amiyyah came to him and said that her father had died without performing hajj. Would it benefit him if she performed the hajj on her father's behalf? The Prophet asked: 'Supposing your father had a debt to pay and you

paid it on his behalf, would this benefit him?' To this her reply was in the affirmative, and the Prophet said, `The debt owed to God merits even greater consideration.[65. Shawkani, Irshaad, p. 212; Ibn Qayyim, I`lam, I, 200.]

The Companions are said to have reached a consensus on the validity of qiyas. We find, for example, that the first Caliph, Abu Bakr, drew an analogy between father and grandfather in respect of their entitlements in inheritance. Similarly, `Umar ibn al-Khattab is on record as having ordered Abu Musa al-Ash'ariy `to ascertain the similitudes for purposes of analogy'.[67. Ibn Hazm, Ihkam, VII, 147.] Furthermore, the Companions pledged their fealty (bay`ah) to Abu Bakr on the strength of the analogy that `Umar drew between two forms of leadership: 'Umar had asked the Companions, `Will you not be satisfied, as regards worldly affairs, with the man with whom the Prophet was satisfied as regards religious affairs?' And they agreed with 'Umar, notwithstanding the fact that the issue of succession was one of the utmost importance. [68. Ibn Hazm, Ihkam, VII, 160; Ibn Qayyim, I'lam, I. 182.] Again, when the Companions held a council to determine the punishment of wine-drinking, `Ali b. Abi Talib suggested that the penalty of false accusation should be applied to the wine drinker, reasoning by way of analogy, 'When a person gets drunk, he raves and when he raves, he accuses falsely.'[69. Shawkani, Irshaad, p. 223; Abu Zahrah, Usul, p.177] It is thus concluded that qiyas is validated by the Qur'an, the Sunnah, and the ijmaa' of the Companions.

The Argument Against Qiyas

Advanced mainly by the Zahiri school, and some Mu'tazilah, including their leader, Ibrahim al-Nazzam.

Ibn Hazm, is the most outspoken against qiyas. The main points of his argument:

1) The rules of Shari'ah are conveyed in the form of commands and prohibitions. There are also the intermediate categories of 'recommended' (mandoob) and `reprehensible' (makrooh), which are essentially varieties of mubah (permissible). There are thus only: command, prohibition, and permissibility. Should there be no clear text in respect of any matter, it would fall under ibadah (permissibility). [70. Two Qur'anic ayat validate ibahah: **'It is He who has created for you all things that are on earth'** (al-Baqarah, 2:29); and **`O you believers! Make not unlawful the good things which God has made lawful to you'** (al-Ma'idah, 5:90).] Commands and prohibitions are determined by the clear authority of the Qur'an, Sunnah, or ijmaa'. [71. Ibn Hazm, Ihkam, VIII, 3.].

2) The supporters of analogy, according to Ibn Hazm, proceed on the assumption that the Shari'ah fails to provide a nass for every matter, contrary to the explicit provisions of the Qur'an: **'We have neglected nothing in the Book'** (al-An'am, 6:89). In yet another passage: **'This day, I perfected year religion for you, and completed My favor upon you'** (al-Ma'idah, 5:4). [72. Ibn Hazm, Ihkam,VIII, 18.]

3) Qiyas derives its justification from an 'illah which is common to both the original and new case. The 'illah is either indicated in the text, in which case the ruling is derived from the text itself and qiyas is redundant; or alternatively, where the 'illah is not so indicated, there is no way of knowing it for certain. Qiyas therefore rests on conjecture. **`conjecture avails nothing against the truth.'** (al-Najm, 53:28).[73. Ibn Hazm, Ihkam, VIII, 9.]

4) And lastly, Ibn Hazm holds that qiyas is clearly forbidden in the Qur'an. Thus we read in sura al-Hujurat (49:1): **'O you believers! Do not press forward before God and His Messenger, and fear God [...]'**, which

means that the believers must avoid legislating on matters on which the lawgiver has chosen to remain silent. The same point is conveyed in the Hadeeth where the prophet ordered the believers as follows: **Ask me not about matters which I have not raised. nations before you were faced with destruction because of excessive questioning and disputation with their prophets. When I command you to do something, do it to the extent that you can, and avoid what I have forbidden**. [75. Ibn Hazm, Ihkam, VIII, 15.].

To sum up, Ibn Hazm's argument is based on two main points: the nusoos of the Qur'an and Sunnah provide for all events, and qiyas is an unnecessary addition. Regarding the first, the majority hold the view that the nusoos do cover all events, either explicitly or through indications. They go beyond the confines of literalism and validate qiyas in the light of the objectives of the Shari'ah. For the majority, qiyas is not a superimposition on the nusoos, but their logical extension. [76. Abu Zahrah, Usul, pp. 179-80.]

With reference to the passages quoted on speculative evidence, it is contended that the ayat forbid speculation (zann) in matters of belief only. As for the practical rules, most partake in zann, and a great deal of the nusoos are themselves speculative in purport and implication (zanni aldalalah).[77.Khallaf, `Ilm, p 79.]

In principle, the Shi'ah Imamiyyah maintain that qiyas is pure conjecture. In addition, the Qur'an, the Sunnah and the rulings of the Imams, according to the Shi'i ulama, provide sufficient guidance. [78. Mutahhari, Jurisprudence, p. 21.] This is definitely the view of the Akhbari branch. But the Usuli branch validate certain varieties, namely qiyas whose 'illah is explicitly stated in the text (qiyas mansoos al-`illah), analogy of the superior (qiyas al-awla) and obvious analogy (qiyas jaliy). But they validate this through ijtihaad and `aql rather than qiyas perse [79. Asghari, Qiyas,p.119,139.].

Qiyas in Penalties

The majority maintain that qiyas is applicable to hudood and kaffaraat, since the Qur'anic passages and aHadeeth quoted in support of qiyas are all worded in absolute terms. [80. Abu Zahrah, Usul, p. 205.]

An example of qiyas in regard to the hudood is the Shari'ah application of the punishment of theft to the nabbaash, who steals the shroud of the dead, as the common `illah is taking away the property of another without his knowledge. A Hadeeth has also been quoted in support of this. [81. Abu Dawood, III, 1229, Hadeeth no. 4395): **'The hand of one who rifles the grave should be amputated, as he has entered the house of deceased.'**]

The Hanafis agree that qiyas may operate in ta'zeer penalties. They would not approve of an analogy between abusive words (sabb) and false accusation (qadhf), nor extend the hadd of zina to (sodomy). These, according to them, may be penalized under ta'zeer.

The main reason is that qiyas is founded on a measure of speculation and doubt. There is a Hadeeth which provides: **`drop the hudood in cases of doubt as far as possible. If there is a way out, then clear the way, for in penalties, if the Imam makes an error on the side of leniency, it is better than making an error on the side of severity'**.[83. Tabrizi, Mishkaat, II, 1061, Hadeeth No 3570; Abu Yusuf, Kitaab al Kharaaj, p. 152; Ibn Qayyim, I'lam, I, 209.]

The majority validate the application of qiyas in regard to kaffaraat. Thus the analogy between the two forms of breaking the fast (iftaar), namely eating and having sexual intercourse, would extend the kaffarah of the latter to the former.[23] Similarly the majority validated the analogy between deliberate killing and erroneous homicide for purposes of kaffarah. The Hanafis are once again in disagreement, as they maintain that for purposes of analogy, the kaffarah resembles the hadd, since doubt cannot be totally eliminated. [85. Zuhayr, Usul, IV, 51.]

Notwithstanding the fact that the jurists have disagreed on the application of qiyas in penalties, it will be noted that the ulama have on the whole discouraged recourse to qiyas in the field of criminal law. Consequently, there is very little actual qiyas to be found in this field. [86. Abu Zahrah, Usul, p. 206.]

Conflicts between Nass and Qiyas

Responding to this, the ulama held two different views:

1) According to Shafi'i, Ahmad, and one view attributed to Abu Hanifah, the question of a conflict is of no relevance, since recourse to qiyas in the presence of nass is ultra vires. [87. Abu Zahrah, Usul, p. 200.]

2) The second view, mainly held by Malikis, also precludes a conflict between qiyas and a clear text, but does not dismiss the possibility of a conflict between a speculative text and qiyas. Analogy could come into conflict with the `Amm of the Qur'an and solitary Hadeeth. The Hanafis maintained that the 'Amm is definitive in implication (qat`i al-dalalah), whereas qiyas is speculative, which would mean qiyas does not specify the 'Amm of the Qur'an. The only situation where the Hanafis envisage a conflict is where the `illah of qiyas is stated in a clear nass. [88. Abu Zahrah, Usul, pp. 201-202.]

The Malikis who represent the majority[24], consider the `Amm of the Qur'an speculative. The possibility is therefore not ruled out of a conflict. Based on this, qiyas, according to most of the jurists, may specify the `Amm of the Qur'an and Sunnah. [89. Abu Zahrah, Usul, p. 203.]

[Conflict between Qiyas and a Solitary Hadeeth]

It is recorded that Imam Shafi`i, Ibn Hanbal and Abu Hanifah do not give priority to qiyas over a solitary Hadeeth. An example of this[25] is the vitiation of ablution (wudu') by loud laughter during the performance of salah, which is the accepted rule of the Hanafi school despite its being contrary to qiyas. Since the

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[23] [Al-Haj: Note that the Shafe'ees and Hanbalis are the ones that don't allow the extension of kaffarah (expiation) to the one who broke the fast by eating or drinking. It is rather the Hanafis, as well as the Malikis, who do that. In this case, the Hanafis wouldn't call it qiyas but negate the difference between the different types of breaking the fast.]

[24] [Al-Haj: Not in the debate over the conflict, but regarding the 'Amm being speculative in implication.]

[25] [Al-Haj: This example only applies to the Hanafis, for the rest do not act upon the mentioned hadeeth due to its weakness. The author probably mentioned this example to counter the belief that the Hanafis, in particular, give precedence to qiyas over the solitary hadeeth. The author's view is not the view of the very vast majority of the Hanafi scholars who recognize that a certain type of qiyas, which is al-qiyas al-jalliy (obvious analogy), is given precedence over the hadeeth whose reporter is not of the fuqahaa' (scholars).]

rule here is based on the authority of a solitary Hadeeth, the latter has been given priority over qiyas, for qiyas would only require vitiation of salah, not the wudu'. [90. Bukhari, Saheeh (Istanbul edn.), I, 51 (Kitaab al-Wudu', Hadeeth no. 34); Khan, Athar, p. 403.] Although the three Imams are in agreement on the principle of giving priority to solitary Hadeeth, regarding this particular Hadeeth, only the Hanafis have upheld it.[26] The majority, including Imam Shafi'i, consider it to be Mursal[27] and do not act on it.

V. [Malik's Position]

The Malikis, **and some Hanbali ulama**, are of the view that in the event of a conflict between a solitary Hadeeth and qiyas, if the latter can be substantiated by another principle or asl of the Shari'ah, then it will take priority over a solitary Hadeeth. [92. Abu Zahrah, Usul, p. 204.] But if no such support is forthcoming, then the solitary Hadeeth must be abandoned. This is the view Ibn al-'Arabi attributed to Imam Malik. For example, the following Hadeeth has been found to be in conflict with another principle: `When a dog licks a container, wash it seven times, one of which should be with clean sand. [93. Ibn Hazm, Ihkam, VIII, 79; Abu Zahrah, Usul, p. 205.] It is suggested that this Hadeeth is in conflict with the permissibility of eating the flesh of game fetched by a hunting dog. There is, on the other hand, no other principle in support of either of the two rulings, so qiyas takes priority.[28]

VI. Abul Husayn al-Basriy divides qiyas into four types:

1) Qiyas founded in a decisive nass, that is, when the original case and the effective cause are both stated in the nass. This type of qiyas takes priority over a solitary Hadeeth.

2) Qiyas founded in speculative evidence, when the asl is speculative text and 'illah is determined through deduction (istinbaat). This qiyas is inferior to a solitary Hadeeth. Al-Basriy claimed 'ijmaa on one and two above.

3) Qiyas in which both the asl and the 'illah are founded in speculative nusoos, in which case it is no more than a speculative evidence and, should it conflict with a solitary Hadeeth, the latter takes priority. On this al-Basriy quotes Imam Shafi'i in support of his view.

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[26] [Al-Haj: Upheld the hadeeth, not the principle, because the Shafi'is and Hanbalis didn't compromise the principle, but abandoned a weak hadeeth.]

[27] [Al-Haj: A type of da'eef (weak), according to Ahl-ul-Hadeeth, where there is a drop in the chain between the tabi'ee (follower) and the Prophet. The Hanafis and Malikis do not consider this type of report weak.]

[28] [Al-Haj: Malik acts upon the hadeeth and prescribes the seven washes, however, he disagreed with the majority understanding of the impurity of the dog's saliva; in truth, the hadeeth is not clear on the impurity, and Malik may have a point in saying that washing the utensil is a devotional act, not based on a comprehensible 'illah, or intended to repel people from mingling with dogs. Therefore, this example doesn't serve the purpose it was mentioned for. It is noteworthy here, as well, to mention that many of Malik's followers vehemently denied that he ever gave precedence to qiyas over the solitary hadeeth. This chain was reported mainly by the Iraqi followers of Malik, but many others didn't concur with them on this.]

4) Qiyas in which the `illah is determined through istinbaat but whose asl is a clear text of the Qur'an or Mutawatir Hadeeth. This qiyas is stronger than two and three above, and the ulama differed as to whether it should take priority over a solitary Hadeeth. [91. Basriy, Mu`tamad, II, 162-64.]

Chapter Ten: Revealed Laws Preceding the Shari'ah of Islam

In principle, all divinely revealed laws emanate from one and the same source, namely, Almighty God. The essence of belief in the oneness of God and need for divine guidance to regulate human conduct constitute the common purpose and substance of all divine religions.

This is confirmed in more than one place in the Qur'an, which proclaims in an address to the Prophet: **`He has established for you the same religion as that which He enjoined upon Noah, and We revealed to you that which We enjoined on Abraham, Moses and Jesus, namely, that you should remain steadfast in religion and be not divided therein'** (al-Shura, 42:13). Also, **`Those are the ones to whom God has given guidance, so follow their guidance [hudahum]'** (al-Anam 6:90).

The ulama are unanimous that all revealed religions are different manifestations of an essential unity. [1. Abu Zahrah, Usul, p.241.] However, since each one of the revealed religions was addressed to different nations at different points of time, they each **have their distinctive features which set them apart from the rest**. The Shari'ah **retained many of the previous laws, while it abrogated or suspended others**. [2. Abu Zahrah, Usul, p. 242.] The jurists are also in agreement that the **laws of previous religions are not to be sought in any source other than that of the Shari'ah of Islam itself**. **The Shari'ah, in other words, is the exclusive source of all laws**.

The question has arisen: whether to regard the laws preceding Shari'ah valid unless specifically abrogated, or nullified unless specifically upheld.

Qur'an and Sunnah refer to rules of previous revelations in three forms:

1. **Simultaneously make it obligatory**. Ex: **'O believers, fasting is prescribed for you as it was prescribed for those who came before you'** (al-Baqarah, 2:183).

2. **Abrogate it**. Ex: **'And to the Jews We forbade every animal having claws and of oxen and sheep, We forbade the fat [. . .] Say: nothing is forbidden to eat except the dead carcass, spilled blood, and pork'** (al-An'am, 16:146).

3. **Without clarifying whether it should be abandoned or upheld**. Unlike the first two eventualities, the present situation has given rise to wider differences. To give an example, we read in the Qur'an, in a reference to the law of retaliation which was enacted in the Torah: **'We ordained therein for them life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal'** (al-Ma'idah, 5:45). In yet another passage in the same sura the Qur'an stresses the enormity of murder in the following terms: **'We ordained for the children of Israel that anyone who slew a person, unless it be for murder or mischief in the land, it would be as if he slew the whole of mankind'** (al-Ma'idah, 5:35). **The majority of Hanafi, Maliki, Hanbali and some Shafi'i jurists** held that the foregoing is part of the Shari'ah and the mention of it by the Qur'an is sufficient to make it binding. On the basis of this the Hanafis validated the execution of a Muslim for

murdering a non-Muslim (i.e. dhimmi), and a man for a woman[29], as they all fall within 'life for life'. [8. Khallaf, Ilm, p.94.] There are some variant opinions, but even those who disagree with the Hanafi approach subscribe to the same principle which they find enunciated elsewhere in the Qur'an, **'and the punishment of an evil is an evil like it'** (al-Shura, 42:40); **'Whoever acts aggressively against you, inflict injury on him according to the injury he has inflicted on you, and keep your duty to God [...]'** (al-Baqarah, 2:194).

The majority of Shafi'is, Ash'arites, and Mu'tazilah maintained that since Islam abrogated the previous laws, they are no longer applicable. [9. Shawkani, Irshaad, p.240.] They quoted: **'For every one of you We have ordained a divine law and an open road'** (al-Ma'idah, 5:48). The **Hadeeth of Mu`adh b. Jabal** indicates only three sources for the Shari'ah, namely the Qur'an, Sunnah and ijtihaad. This last point has, however, been **disputed in that the Qur'an itself contains numerous references to other revealed scriptures**. Furthermore **the Prophet did not resort to the Torah and Injeel**[30] in order to find the rulings of particular issues, especially at times when he postponed matters in anticipation of divine revelation. The only exception cited is when the Prophet referred to the Torah on the stoning of Jews for adultery. But this was only to show, as Ghazali explains, that stoning (rajm) was not against their religion. [12. Ghazali, Mustasfa, I, 133.] It is also said that the Prophet was ordered to follow the previous revelations as a source of guidance only in regard to the essence of faith. Their guidance cannot be upheld in toto in the face of clear evidence some of their laws have been abrogated. [4. Ghazali, Mustasfa, I, 134]

The correct view is that of the majority[31], which maintains that **whenever a ruling of the previous scriptures is quoted without abrogation, it becomes an integral part of the Shari'ah**. [13. Khallaf, `Ilm, p. 94.]

And finally, it may be added, as Abu Zahrah pointed out, that **disagreement among jurists on the authority of the previous revelations is of little consequence**, as the **Shari'ah is generally self-contained and its laws are clearly identified**. With regard to retaliation, for example, the issue is resolved, once and for all, by the Sunnah which contains clear instructions on retaliation. [14. Abu Zahrah, Usul, p. 242.]

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[29] [Al-Haj: The man for a woman is a matter of agreement.]

[30] [Al-Haj: this is not a good argument, since no one said that rules will be taken from the previous scriptures directly. The disagreement is about what is mentioned in the Quran or Sunnah to have been legislated for the previous nations.]

[31] [Al-Haj: it is hard to determine which position in this disagreement is the majority position.]

Chapter Eleven: The Fatwa of a Companion

The Sunni ulama are **in agreement that the consensus (ijmaa`) of the Companions is a binding proof**. The question arises, however, as to **whether the fatwa of a single Companion should also be recognized as a proof**, and given precedence over evidences such as qiyas or the fatwas of other mujtahidun. A number of leading jurists from various schools answered in the affirmative.

[Why are they special?][32]

The direct access to the Prophet the Companions enjoyed, and

their knowledge of the problems and circumstances surrounding the revelation, known as asbaab al-nuzool, put them in a unique position.

Some ulama and transmitters of Hadeeth even equated the fatwa of a Companion with the Sunnah.[33] The most learned Companions, especially the four Caliphs, are particularly noted. [1. Khallaf, `Ilm, p. 94.]

This is perhaps attested by the fact that the views of the Companions were occasionally upheld a by the Qur'an. Ex: concerning the treatment of the prisoners of war following the battle of Badr, the ayah (al-Anfal, 8:67 is known to have confirmed the view which `Umar b. al-Khattab had earlier expressed on the issue. [2. Ghazali, Mustasfa, I, 136.]

Who is exactly a Companion?

According to the majority, anyone who met the Prophet, while believing in him, even for a moment and died as a believer, is a Companion (sahabi). Others held that prolonged company, or frequent narration of Hadeeth, must be fulfilled in order to qualify a person as a sahabi. [3. Shawkani, Irshaad, p. 70.] But notwithstanding the literal implications of the word sahabi, the majority view is to be preferred, namely that continuity or duration of contact with the Prophet is not a requirement.

The saying of a Companion, referred to both as qawl al-sahabi, and fatwa al-sahabi, normally means an opinion that the Companion had arrived at by way of ijtihaad in the absence of a ruling in the Qur'an, Sunnah and ijmaa`. For in the face of a ruling in these sources, the fatwa of a Companion would not be the first authority on that matter.

As stated earlier, **there is no disagreement among the jurists that the saying of a Companion is a proof which commands obedience when it is not opposed by other Companions**. Rulings on which the

[32] [Al-Haj: it may be added here that their understanding of the language of the revelation was superior to the latter generations, particularly with the mixing of various non-Arabic speaking nations in the mosaic of the early Islamic state. Also, they are the generation that was deemed best by Allah and His messenger. They didn't fall into innovations, and remained in entirety committed to the Sunnah.]

[33] [Al-Haj: That is only in the absence of a direct sunnah from the Prophet himself (blessings and peace be upon him).]

Companions are known to be in agreement are binding. An example of this is the grandmother's share of one-sixth in inheritance on which the Companions have agreed, and it represents their authoritative ijmaa`.

There is general agreement among the ulama of usul on the point that the ruling of one Companion is not a binding proof over another. For they were allowed to disagree with one another. But the ulama of usul differed as to whether the ruling of a Companion constitutes a proof as regards the succeeding generations. [8. Amidi, Ihkam, IV, 149.]

Views on the Fatwa of a Companion

There are three views on this, which may be summarized as follows:

1. **The fatwa of a Companion is a proof absolutely, and takes priority over qiyas**. This is the view of **Malik, one of the two views of Shafi'i, one of the two views of Ahmad and of some Hanafis**. They referred to the ayah: **'the first and foremost among the Emigrants and Helpers and those who followed them in good deeds, God is well-pleased with them, as they are with Him'** (al-Tawbah, 9:100). In this text, God has praised **'those who followed the Companions'**. Another ayah reads in an address to the Companions: **'You are the best community that has been raised for mankind; you enjoin right and you forbid evil'** (Al-`Imran, 3:109). It has, however, been suggested that the references to the Companions are all in the plural, which would imply that their individual views do not necessarily constitute a proof. But in response to this, it is argued that the Shari'ah establishes their uprightness ('adalah) as individuals. The proponents of this view also referred to several aHadeeth, of which: **'My Companions are like stars; whoever you follow will lead you to the right path.'** Another Hadeeth reads: **'Honor my Companions, for they are the best among you, and then those who follow them and then the next generation, and then lying will proliferate after that [. . .]'** [11. Tabrizi, Mishkaat, III, 1695, Hadeeth no. 6001 and 6003; Ghazali, Mustasfa, I, 136.] It is, however, contended these refer to the dignified status of the Companions, and not categorical that their decisions must be followed. In addition, since these aHadeeth are conveyed in absolute terms that they identify all Companions as a source of guidance, it is possible the Prophet meant only those who transmitted the Hadeeth. The **Companions in this sense would be viewed as mere transmitters**. [12. Zuhayr, Usul, IV, 192.] Al-Ghazali also quotes a number of other aHadeeth in which the **Prophet praises individual Companions**; they do not necessarily mean the saying of that Companion is a binding proof. [13. Ghazali, Mustasfa, I, 136-37.]

2. **The ijtihaad of a Companion is not a proof and does not bind the succeeding generations** of mujtahidun or anyone else. This view is held by the Ash'arites, Mu`tazilah, Imam Ahmad (one of his two views), and the Hanafi jurist al-Karkhiy. [14. Zuhayr, Usul, IV, 193.] They quoted (al-Hashr, 59:2): **`Consider, O you who have vision.'** It makes ijtihaad the obligation of everyone who is competent, and makes no distinction whether the mujtahid is a Companion or anyone else. This ayah also indicates that the mujtahid must rely directly on the sources. They also refer to the ijmaa' of the Companions that the views of one among them did not bind the rest. [15. Ghazali, Mustasfa, I, 135.] **Al-Ghazali and al-Amidi** consider this view preferred. **Al-Shawkani** also held that the ummah is required to follow the Qur'an and Sunnah. And no other individual has been accorded a status similar to that of the Prophet. [16. Shawkani, Irshaad, p. 214.] **Abu Zahrah** criticized al-Shawkani's

conclusion, and said that the Companions were most diligent in observing the Qur'an and Sunnah, and it is because of this and their closeness to the Prophet that their fatwa carries greater authority. [17. Abu Zahrah, Usul, p.172.]

3. **Proof when it is in conflict with qiyas but not when it agrees with qiyas**. **This is attributed to Abu Hanifah**, The explanation for this is that when the ruling of a sahabi conflicts with qiyas, it is usually for a reason, and is an indication of the weakness of the qiyas. In the event where the ruling of the Companion agrees with qiyas, it merely concurs with a proof on which the qiyas is founded in the first place. [18. Zuhayr, Usul, IV, 194.]

4. **Only the rulings of the four Caliphs command authority**. This view quotes in support the Hadeeth, **'You are to follow my Sunnah and the Sunnah of the Khulafaa' Rashidoon after me'** This is even further narrowed down, according to another Hadeeth, to the first two: **`Among those who succeed me**, **follow Abu Bakr and 'Umar'**. The authenticity of this second Hadeeth has, however, been called into question, and in any case, it is suggested that the purpose of these aHadeeth is merely to praise these luminaries, and commend their excellence of conduct.[19. Ibn Majah, Sunan, I, 37, Hadeeth no. 97; Ghazali, Mustasfa, I, 135; Amidi, Ihkam, IV, 152.]

Imam Shafi'i is on record as having stated that he follows the fatwa of a Companion in the absence of a ruling in the Qur'an, Sunnah and ijmaa'. **Al-Shafi'i's view on this point is, however, somewhat ambivalent**. In a conversation with al-Rabi', al-Shafi'i has stated: 'We find that the ulama have sometimes followed the fatwa of a Companion and have abandoned it at other times; and even those who have followed it are not consistent in doing so.' At this point the interlocutor asks the Imam, 'What should I turn to, then?' To this al-Shafi'i replies: **'I follow the ruling of the Companion when I find nothing in the Qur'an, Sunnah or ijmaa', or anything which carries through the implications of these sources.'** Furthermore, when the ruling of the Companion is in agreement with qiyas, then that qiyas, according to al-Shafi`i, is given priority over a variant qiyas which is not so supported. [20. Shafi'i, Risalah, p. 261.]

Imam Abu Hanifah is also on record as having said, **`When I find nothing in the Book of God and the Sunnah of the Prophet, I resort to the saying of the Companions. I may follow the ruling which appeals to me and abandon that which does not, but I do not abandon their views altogether and do not give preference to others over them'** It thus appears that Abu Hanifah would give priority to the ruling of a Companion over qiyas, and although he does not consider it a binding proof, it is obvious he regards it preferable to the ijtihaad of others. [21. Abu Zahrah, Usul, p. 170.]

Imam Ahmad distinguished the fatwas of Companions into two types,

1. **A fatwa which is not opposed by any other Companion**. He regards this authoritative. Ex: the admissibility of the testimony of slaves, on which the Imam has followed the fatwa of Anas b. Malik. He said that he had not known of anyone who rejected the testimony of a slave.

2. **A fatwa on which the Companions disagreed. In this situation**. Imam Ahmad considers their opinions equally authoritative, unless it is known that the Khulafaa' Rashidoon adopted one, in which case he

would do likewise. Ex: the allotment of a share in inheritance to germane brothers in the presence of the father's father. According to Abut Bakr, the father's father in this case is accounted like the father who would in turn exclude the germane brothers. Zayd b. Thabit, on the other hand, counted the father's father as one of the brothers and would give him a minimum of one-third, whereas `Ali counted him as one of the brothers whose entitlement must not be less than one-sixth. Ahmad is reported to have accepted all three views, for they reflect the guidance their authors received from the Prophet. [22. Abu Zahrah, Ibn Hanbal, p. 287.]

The Hanbali scholar Ibn Qayyim explains that the fatwa of a Companion may fall into any of six categories.

1- based on what the Companion might have heard from the Prophet. The Companions knew more about the teachings of the Prophet than what has come down to us. For example, Abu Bakr transmitted no more than one hundred aHadeeth from the Prophet.
2- based on what he might have heard from a fellow Companion,
3- based on his own understanding of the Qur'an in such a way the matter would not be obvious to us had the Companion not issued a fatwa on it.
4- based on the collective agreement of the Companions.
5- based on the learned opinion and general knowledge he acquired.
6- based on an understanding of his which is not a result of direct observation but information he received indirectly, and it is possible his opinion is incorrect, in which case his fatwa is not a proof. [23. Ibn Qayyim, I`lam, II, 191ff.]

Lastly, it will be noted that **Imam Malik** has not only upheld the fatwa of Companions but almost equated it with the Sunnah. In his Muwatta', he recorded over 1,700 aHadeeth, of which over half are sayings of Companions. **On a similar note, Abu Zahrah reached the conclusion that the four Imams have all, in principle, upheld and followed the fatwas of Companions**, although some of their followers held different views. Abu Zahrah then quotes Ibn al-Qayyim's view on this matter which we have already discussed, and supports it. But it is obvious from the tenor of his discussion and the nature of the subject as a whole that **the fatwa of a Companion is a speculative proof only**.[24. Abu Zahrah, Usul, p. 172.] Although the leading Imams are in agreement that the fatwa of a Companion is authoritative, none categorically stated that it is a binding proof.

Chapter Twelve: Istihsaan, or Equity in Islamic Law

Istihsaan or Equity?

'Equity' is a Western legal concept grounded in the idea of fairness, and derives legitimacy from a belief in natural rights or justice beyond positive law. Istihsaan and equity are both inspired by the principle of fairness, and authorize departure from a rule of positive law when its enforcement leads to unfair results. However, **equity relies on the concept of natural law**, whereas **Istihsaan relies on the values of the Shari'ah**. This difference need not be over-emphasized if one bears in mind that **values upheld by natural law and Islam are substantially concurrent**.[34] Both assume that right and wrong are not a matter of relative convenience for the individual, but derive from an eternally valid standard. **But natural law differs with the divine** law in its assumption that right and wrong are inherent in nature. [2. See for a discussion Kerr's Islamic Reform,p.57.] Unlike equity, Istihsaan does not seek to constitute an independent authority beyond Shari'ah. [3. See John Makdisi, 'Legal Logic,' p.90.]

Istihsaan played a prominent role in the adaptation of Islamic law to the changing needs of society and provided it with the necessary flexibility. Yet because of its essential flexibility, the jurists discouraged an over-reliance on it lest it result in circumventing the Shari'ah.

The Hanafi, Maliki, and Hanbali jurists validated Istihsaan as a subsidiary source of law, but the Shafi'i, Zahiri and Shi'i ulama rejected it. [4. see Sabuni, Madkhal, p. 119ff.]

[Definition]

Istihsaan literally means `to approve, or deem something preferable'. It is a derivation from hasuna, which means being good or beautiful.

In its juristic sense, it is a method of exercising personal opinion in order to avoid rigidity and unfairness from the literal enforcement of existing law. **`Juristic preference'** is a fitting description of Istihsaan, as **it involves setting aside an established analogy in favor of an alternative which better serves the ideals of justice and public interest**.

[‘Umar and Istihsaan]

It has been suggested that the ruling of `Umar b. al-Khattab, **not to enforce the penalty of theft** during a famine, and the **ban on sale of slave-mothers** (ummahat al-awlad), and **marriage with kitabiyahs** in certain cases were all instances of Istihsaan. [6. Cf. Ahmad Hasan, Early Development, p.145.]

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[34] Nature is not a willful agent, and no one speaks on its behalf. God is the creator, and He revealed the law to man through messengers with proven credibility. The natural law doesn’t exist as a defined entity; what exist are people’s claims on its behalf.

The Hanafi jurist al-Sarakhsiy (d. 483/1090), considers Istihsaan to be a **departure from qiyas in favor of a ruling which dispels hardship and brings about ease**. 'Avoidance of hardship (raf' al-haraj)' al-Sarakhsiy adds, `is a cardinal principle of religion: **`God intends facility for you, and He does not want to put you in hardship'** (al-Baqarah 2:185). A Hadeeth reads: **`The best of your religion is that which brings ease to the people.'** [7. Sarakhsiy, Mabsoot, X, 145; Ibn Hanbal, Musnad, V. 22.]

Al-Khudari rightly explained that in their search for solutions to problems, the Companions and Successors resorted to the Qur'an and Sunnah. **But when they found no answer in these, they exercised their personal opinion (ra'y)** formulated in light of the general principles and objectives of Shari'ah. This is **illustrated, for example, in thefollowing judgment of `Umar ibn al-Khattab**: he was approached by Ibn Salamah's neighbor who asked for permission to extend a water canal through Ibn Salamah's property, and he was granted the request on the ground that no harm was likely to accrue to Ibn Salamah, whereas extending a water canal was to the manifest benefit of his neighbor. [8. Khudari, Tareekh, p.199.]

It thus appears that Istihsaan is essentially a form of ra'y which gives preference to the best of the various solutions for a particular problem. Hence it is not surprising to note Imam Malik's observation that `Istihsaan represents nine-tenth of human knowledge'. [9. Abu Zahrah, Usul, p. 207, and 215; Shatibiy, Muwafaqaat, IV. 208.] **Istihsaan is the antidote to literalism and takes a broad view of the law**.

To give an example, **oral testimony** is the standard form of evidence in Islamic law, but the rule that testimony should be given orally is determined by consensus. Muslim jurists insisted on oral testimony and have given it priority over other methods, including confession and documentary evidence. In their view, this was the most reliable means of discovering the truth. **The question arises, however, whether one should still insist on oral testimony** at a time when other methods such as photography, sound recording, laboratory analyses, etc. offer at least equally, if not more, reliable methods of establishing facts. Here we have, I think, a case for a recourse to Istihsaan. The rationale of this Istihsaan would be that the **law requires evidence in order to establish the truth, and not the oral testimony for its own sake**.

[Controversy on Definition]

The Hanafis, on the whole, adopted al-Karkhiy's (d. 340/947) definition. **Istihsaan is accordingly a principle which authorizes departure from an established precedent in favor of a different ruling for a reason stronger than the one obtained in that precedent**. Al-Sarakhsiy adds that the precedent normally consists of an established analogy which may be abandoned in favor of a superior proof, that is, the Qur'an, the Sunnah, necessity (darurah), or a stronger qiyas. [10. Sarakhsiy, Mabsoot, X, 145.]

The Hanbali definition also seeks to relate Istihsaan closely to the Qur'an and Sunnah. **Thus according to Ibn Taymiyyah, Istihsaan is the abandonment of one legal norm (hukm) for another which is considered better on the basis of the Qur'an, Sunnah, or consensus**. [11. Ibn Taymiyyah, Mas'alah al-Istihsaan, p. 446.]

The Malikis lay greater emphasis on istislaah, yet they have in principle validated Istihsaan. They view it as a broad doctrine less stringently confined to the Qur'an and Sunnah. **According to Ibn al-'Arabi, 'It is to**

abandon exceptionally what is required by the law because applying the existing law would lead to a departure from some of its own objectives.' **Ibn al-'Arabi points out that its essence is to act on 'the stronger of two indications (dalilayn)'.** [12. Ibn al-Arabi, Ahkaam al-Qur'an, II, 57.]

It appears that departure from an existing precedent on grounds of more compelling reasons is a feature of Istihsaan. The departure may be from an apparent analogy (qiyas jaliy) to a hidden analogy (qiyas khafiy), or to a ruling given in the nass (i.e. the Qur'an or the Sunnah), consensus, custom, or public interest.

[Proof-Value of Istihsaan]

There is no direct authority for Istihsaan in the Qur'an or Sunnah, but the jurists quoted both in their arguments for it. The opponents, however, argued that it amounts to a deviation from Shari'ah. Both sides were able to quote the Qur'an and Sunnah because the ayat quoted are open to various interpretation.

The Hanafis mainly quoted two ayahs, both employ a derivation of the root word hasuna:

1. **And give good tidings to those of my servants who listen to the word and follow the best of it [ahsanahu]. Those are the ones God has guided and endowed with understanding (al-Zumar, 39:18);**

2. **And follow the best [ahsan] of what has been sent down to you from your Lord (al-Zumar, 39:55)** Qawl (lit.`word' or `speech') in the first ayah could either mean the word of God, or any other speech. If it means the former, then the question is whether one should distinguish between the words of God which are ahsan (the best) as opposed to those which are merely hasan (good). Some suggested the reference here is to a higher course of conduct. Punishing the wrong-doer, for example, is the normal course, but forgiveness may at times be preferable (ahsan).

The following two aHadeeth have also been quoted in support of Istihsaan:

1. **`What the Muslims deem to be good is good in the sight of God'** [15. Amidi (Ihkam, I, 241) considers this to be a Hadeeth but it is more likely to be a saying of the prominent companion, 'Abd Allah Ibn Mas'ud.];

2. **'No harm shall be inflicted or reciprocated in Islam.'** [16. Ibn Majah, Sunan, II, 784, Hadeeth no. 2340; Shatibiy, Muwafaqaat, III, 17.]

The critics of Istihsaan argued that none of the foregoing provide authority. The second ayah does not bind one to a search for the best in the revelation: if there is an injunction, it would bind the individual regardless of whether it is the best or otherwise. [17. Amidi, Ihkam, IV, p. 159.] **As for the tradition, 'what the Muslims deem good** is good in the sight of God', al-Ghazali and al-Amidi have observed that, if anything, this would provide authority for consensus (ijmaa'). [18. Amidi, Ihkam, IV, p. 160.]

Critics suggested the doctrine was introduced by Hanafis in response to certain urgent situations. They then tried to justify themselves by quoting the Qur'an and Hadeeth ex-post facto. [19. Ahmad Hasan, `The Principle of Istihsan', p. 347.]

[First Introducer]

While Goldziher suggested that **Abu Hanifah was the first** to use the term in its juristic sense, Joseph Schacht attributed the origin of istihsan to his disciple, **Abu Yusuf**. Fazlur Rahman confirmed the former view, which is substantiated by the fact that al-Shaybani, another disciple, attributed it to Abu Hanifah himself. [20. Fazlur Rahman, Islamic Methodology, p.32.]

Ra'y, Qiyas and Istihsan

Broadly speaking, qiyas is the logical extension of an original ruling of the Qur'an, the Sunnah to a similar case for which no direct ruling can be found. Qiyas in this way extends the ratio legis of the revelation through human reasoning. **Istihsan relies even more heavily on ra'y**. Hence the **controversy over istihsan is essentially similar to that with qiyas**. However, because of its closer identity with the Qur'an and Sunnah, qiyas gained wider acceptance. The Companions were careful not to exercise ra'y at the expense of the Sunnah. With territorial expansion and dispersal of those learned in Hadeeth, fear of isolating the Sunnah led the jurists to restrict free recourse to ra'y.

Exercise of ra'y during the formative stages led to considerable disagreement.

Those who called for a close adherence to the Hadeeth, namely Ahl al-Hadeeth, mainly resided in Makkah and Madinah. They were, in other words, literalists who denied the mujtahid the liberty to resort to basic rationale of the Shari'ah. Whenever they failed to find an explicit authority in the sources, they remained silent. [22. Khudari, Tarikh, p. 200ff.]

The fuqaha' of Iraq, on the other hand, resorted more liberally to personal opinion, which is why they are known as **Ahl al-Ra'y**. In their view, the Shari'ah was in harmony with the dictates of reason. Hence they had little hesitation to refer both to the letter and spirit of Shari'ah.

Any restrictions imposed on istihsan were basically designed to tilt the balance in the debate over ra'y versus literalism in favour of the latter. Istihsan and maslahah were to be applied strictly in the absence of a specific ruling in the Qur'an or the Sunnah. [23. Coulson, Conflicts, pp. 6-7.]

Qiyas Jali, Qiyas Khafi and Istihsan

Qiyas jali or 'obvious analogy', is a straightforward qiyas easily intelligible to the mind. An oft-quoted example of this is the analogy between wine and another intoxicant. But **qiyas khafi, or 'hidden analogy'**, is a more subtle form of analogy intelligible only through deeper thought. **Qiyas khafi, which is also called istihsan or qiyas mustahsan** (preferred qiyas) **is stronger and more effective in repelling hardship** than qiyas jali, presumably because it is arrived at not through superficial observation of similitudes, but deeper analysis. **According to the majority of jurists, istihsan consists of a departure from qiyas jali to qiyas khafi**. When the jurist is faced with a problem for which no ruling can be found in the text (nass), he may search for a precedent and try to find a solution by analogy. His search may reveal two different solutions, one of which is based on an obvious analogy and the other on a hidden analogy. If there is a conflict, then the former must be rejected. For the hidden analogy is considered to be more effective. This is one form of istihsan.

But there is another type of istihsan which mainly consists of **making an exception to a general rule when the jurist is convinced justice will be better served** by making such an exception. The jurist might have reached this decision as a result of his personal ijtihad, or the **exception may have already been authorised by any of the following: nass, ijma', approved custom, necessity (darurah), or considerations of public interest (maslahah).** [24. Sha`ban, Usul, p.100.]

1) **To give an example of istihsan which consists of departure from qiyas jali** to qiyas khafi, it may be noted that under Hanafi law, **waqf (charitable endowment) of cultivated land** includes the **transfer of all ancillary rights** 'easements', such as the right of water (haqq al-shurb), right of passage (haqq al-murur) and right of flow (haqq al-masil), even if these are not mentioned in the instrument of waqf. It is a rule of the law of contract, including sale, that the object of contract must be clearly identified. Now if we draw analogy **between sale and waqf – as both involve transfer of ownership** – we must conclude that the attached rights can only be included in the waqf if they are explicitly identified. Such an analogy would lead to inequitable results: the waqf of lands, without its ancillary rights, would frustrate the basic purpose of waqf. The hidden analogy in this case is to draw a parallel, not with the contract of sale, but **the contract of lease (ijarah), for both involve a transfer of usufruct (intifa').** Since usufruct is the essential purpose of ijarah, this contract is valid, on the authority of a Hadeeth, even without a clear reference to the usufruct.

To give another example, **supposing A buys a house in a single transaction from B and C** at a price of 40,000 payable in installments. **A pays the first installment of 2,000 to B assuming B will hand over C's portion** to him. **B loses the 2,000.** Who should suffer the loss? By qiyas jali, B and C should share the loss. For B received the money on behalf of the partnership not for himself alone. But by applying istihsan, **only B suffers the loss.** For C was under no obligation to obtain his portion from B. It was only his right. C's portion would consequently become a part of the remainder of the debt. **This is based on the subtle analogy that one who is under no obligation should not have to pay any compensation.** [25. Khallaf, 'Ilm, p.82.]

2) **Making an exception to a general rule**, which is why some called this `exceptional istihsan' (istihsan istithna'i), as opposed to 'analogical istihsan' (istihsan qiyasi) consisting of a departure from one qiyas to another. Of these two, exceptional istihsan is stronger, for it derives support from another source, especially when this is the Qur'an or Sunnah. The scholars of various schools are in agreement on this. [27. Thus the Maliki jurist Ibn al-Hajib classifies istihsan into three categories: accepted (maqbul), rejected (mardud) and uncertain (mutaraddid). See Ibn al-Hajib, Mukhtasar, II, 485.] **But the authority for an exceptional istihsan may be given in the nass, or other recognised proofs: consensus (ijma'), necessity (darurah), custom (`urf or `adah), and public interest (maslahah).**

2.1. Exceptional istihsan based in the **nass**: **`It is prescribed that when death approaches any of you, if he leaves any assets, that he makes a bequest to parents and relatives'** (al-Baqarah 2:180). This represents an exception to a principle that a **bequest is not valid**, since it is tantamount to interference in the rights of heirs. However, the Qur'an favours an exception which contemplates fairness, especially in cases where a relative is destitute yet excluded from inheritance. [28. Cf. Sabuni, Madkhal, p. 123.]

2.2. Exceptional istihsan based on the **Sunnah**: ijarah (lease). According to a general rule, an object which does not exist may not be sold. However, **ijarah has been validated despite being the sale of usufruct which is usually non-existent (in exchange for rent)** at the moment the contract is concluded. Analogy would thus invalidate ijarah, but istihsan validates it on the authority of the Sunnah (and ijma'). [29. Cf. Musa, Madkhal, p.197; Khallaf, 'Ilm, p. 82. For aHadeeth which validate various types of ijarah (land, labour, animals, etc.) see Ibn Rushd, Bidayah, II, 220-221.]

2.3. Exceptional istihsan authorised by **ijma`**: the **contract for manufacture of goods**. Recourse to this form of istihsan is made when someone places an order with a craftsman for certain goods to be made. Istihsan validates this transaction **despite the fact that the object of the contract is non-existent** at the time the order is placed. [31. See Abu Zahrah, Usul, p. 211.]

2.4. Exceptional istihsan based on **necessity (darurah)**: strict analogy requires that witnesses, in order to be admissible, must in all cases be `adl, that is, upright and irreproachable. However if the qadi happens to be in a place **where adl witnesses cannot be found, he admits witnesses not totally reliable** so that the rights of the people may be protected. [33. Cf. Sabuni, Madkhal, p.124.]

2.5. Exceptional istihsan authorised by **custom**: the **waqf of moveable goods**. Since waqf is the endowment of property on a permanent basis, and **moveable goods are subject to destruction and loss**, they are not to be assigned in waqf. The Hanafis, however, validated the waqf of moveable goods as books, tools and weapons on grounds of popular custom. [34. Cf. Sabuni, Madkhal, p.124.] Another example is **bay' al-ta'ati**, or sale by way of `give and take', where the **rule that offer and acceptance must be verbally expressed is not applied**.

2.6. Exceptional istihsan founded on **considerations of public interest (maslahah)**: the **responsibility of a trustee (amin) for goods** he receives in his custody. The rule here is that he is not responsible for damage to such property unless it can be attributed to his personal fault or negligence (taqsir). Hence a tailor, a shoemaker or a craftsman is not accountable for the loss of goods in his custody. But the **jurists held him responsible, unless the loss in question is caused by a calamity**, such as fire or flood, which is totally beyond his control, so that tradesmen **exercise greater care in safeguarding people's property**. [36. Sabuni, Madkhal, p. 125.]

The Hanafi – Shafi'i Controversy Over Istihsan

Al-Shafi`i raised serious objections against istihsan**, which he considers a form of pleasure-seeking (taladhdhudh wa-hawa) and 'arbitrary law-making'. [37. Shafi'i, al-Umm, 'Kitab Ibtal al-Istihsan', VII, 271.] Al-Shafi`i quotes al-Nisa' (4:59): **`Should you dispute over a matter among yourselves, refer it to God and His Messenger, if you do believe in God and the Last Day.' He continues: Anyone who rules on the basis of a nass or ijtihad which relies on an analogy to the nass has fulfilled his duty. But anyone who prefers that which neither God nor His Messenger has approved, his preference will be acceptable neither to God nor the Prophet. Unlike qiyas, whose propriety can be tested by the methodology to which it must conform, istihsan is not regulated. [38. Shafi'i, al-Umm, 'Kitab Ibtal al-Istihsan', VII, 272.]

In response to this, **the Hanafis asserted that istihsan is not arbitrary preference**. **It is a form of qiyas**, not an independent source. **If this is accepted**, it would imply that **istihsan would lose its status** as a juristic principle in its own right. This would confine it to matters on which a parallel ruling could be found in the sources. However, Ahmad Hasan observed that istihsan is more general than qiyas khafi, as the former embraces a wider scope. [39. Ahmad Hasan, 'The Principle of Istihsan', p.352.] Abu Hanifah did not consider istihsan a kind of qiyas [...] nor use the word in any technical sense, but in its usual meaning, namely, abandoning qiyas for an opinion more subservient to social interest. [40. Aghnides, Muhammedan Theories, p.73.] Aghnides suggested that when the Shafi'is attacked istihsan on the grounds that it meant a setting aside of revealed texts, the Hanafis felt forced to show that such was not the case.

Al-Ghazali criticized istihsan on different grounds but observed that the **Shafi`is recognised istihsan based on an indication (dalil)** from the Qur'an or Sunnah. [42 . Ghazali, Mustasfa, I. 137.] He is **critical of Abu Hanifah for his departure, in a number of cases, from a sound Hadeeth** in favour of qiyas or istihsan. [43. For example, implementing the punishment of zina on the testimony of witnesses each of whom point at a different corner of the room where zina is alleged to have taken place. According to Ghazali, this doubt (shubha) prevents the penalty, for according to a Hadeeth, hudud are to be dropped in all cases of doubt. Abu Hanifah's ruling is based on istihsan, on the grounds that disbelieving Muslims is reprehensible. (Mustasfa, I, 139).] Finally, al-Ghazali **rejects istihsan based on custom**, for it is not a source of law. While referring to the example of entry to a public bath for a fixed price without quantifying the consumption of water, al-Ghazali asks: `How is it known that the community adopted this by istihsan? Is it not true that this was the custom during the time of the Prophet, in which case it becomes a tacitly approved Sunnah?' [44. Mustasfa, II, 138.]

**Another Shafi'i jurist, al-Amidi, stated that alShafi`i himself resorted to istihsan** and has been quoted using a derivation of istihsan on several occasions including, `I approve (astahsinu) the proof of pre-emption (shuf`) to be three days' (following the date when the sale of the property in question came to the knowledge of the claimant). Al-Amidi thus concludes that `there is no disagreement on the essence of istihsan between the two schools. [45. Amidi, Ihkam, IV, 157.]

The Maliki jurist al-Shatibi held that istihsan does not mean the pursuit of one's desires; on the contrary, a jurist who understands istihsan has a profound understanding of the intention of the Lawgiver. When the jurist discovers that a strict application of analogy leads to loss of maslahah and possibly evil (mafsadah) then he must resort to istihsan. [46. Shatibi, Muwafaqat, IV, 206.]

Al-Taftazani observed that neither of the two sides of controversy understood one another. [49. Taftazani, Talwih, p. 82. Taftazani was sometimes considered a Hanafi and sometimes a Shafi'i. See al-Mawsu`ah al-Fiqhiyyah, I, 344.] Al-Taftazani's assessment has been endorsed by Khallaf, Abu Zahrah and Yusuf Musa.

Abu Zahrah observes that, 'One exception apart, none of al-Shafi'is criticisms are relevant to the Hanafi conception of istihsan'. The one exception that may bear out some of al-Shafi'i's criticisms is istihsan which is authorised by custom. For custom is not a recognised source of law and is, in any case, not sufficiently authoritative to warrant a departure from qiyas. [51. Abu Zahrah, Usul, p. 215.]

Conclusion

To resolve some of the differences we may go back and recapture the meaning given to istihsan by Abu Hanifah and the early ulama. There is evidence Abu-Hanifah did not conceive of istihsan as an analogical form of reasoning. When al-Shafi`i wrote his Risalah there was still little sign of a link between it and qiyas. Originally istihsan was conceived in a wider form close to its literal meaning. One is here reminded of Malik's statement which designates istihsan as nine-tenth of human knowledge, which grasps the essence of istihsan as a method of finding better alternatives to problems beyond the confines of analogical reasoning. Istihsan is basically antithetic to qiyas not part of it. Much of the controversy developed under the pressure of conformity to the strict requirements of the legal theory finally formulated by alShafi`i and gradually accepted by others.

The thrust of al-Shafi'i's effort in formulating the legal theory of usul was to define the role of reason vis-à-vis revelation. Al-Shafi'i confined the scope of reasoning to analogy: "On all matters touching the life of a Muslim there is either a binding decision or an indication as to the right answer. If there is a decision, it should be followed; if there is no indication as to the right answer, it should be sought by ijtihad, and ijtihad is qiyas." [52. Shafi'i, Risalah, p. 206.] From that point onward, **any injection of rationalist principles into the legal theory had to seek justification through qiyas**.

The next issue is **whether an istihsan which is founded in the Qur'an, Sunnah, or ijma` should be called istihsan** at all. To regard a Qur'anic ruling as an istihsan can only be true if istihsan is used in its literal sense. Notwithstanding the fact that many observers considered Abu'l-Hasan al-Karkhi's definition to be most acceptable, my enquiry leads to the c**onclusion that the Maliki approach to istihsan and Ibn al`Arabi's definition, is probably closest to the original** conception, for it does not seek to establish a link between istihsan and qiyas.

Istihsan has undoubtedly played a significant role sometimes ranked even higher than that of qiyas. It features most prominently in bridging the gap between law and social realities by enabling the jurist to pay individual attention to circumstances and peculiarities of particular problems.

But for reasons which have already been explained, **istihsan has not been utilised to the maximum** of its potential. Hence, **the gap between the theory and practice developed in Islamic Law**. [53. Joseph Schacht has devoted a chapter to the subject, entitled `Theory and Practice' where he elaborates on how the gap between the law and social realities widened: An Introduction, pp.76-86.]

The only consideration that needs to be closely observed in istihsan is whether there exists a more compelling reason to warrant a departure from an existing law. The reason which justifies resort to istihsan must not only be valid in Shari`ah but must serve a higher objective of it and therefore be given preference over the existing law deemed unfair. **In this sense, istihsan offers considerable potential for innovation and for imaginative solutions** to legal problems. Istihsan calls for a higher level of analysis and refinement which must in essence transcend the existing law and analogy.

Analogy essentially extends the logic of the Qur'an and Sunnah, whereas istihsan is designed to tackle the irregularities of qiyas. Thus it would seem methodologically incorrect to amalgamate the two into a single formula. Istihsan has admittedly not played a noticeable role in the legal and judicial practices of our times.

Only the rulings of the jurists of the past have been upheld on istihsan, and even this has not been totally free of hesitation. **Istihsan can best be used as a method by which to improve the existing law**, to strip it of impractical and undesirable elements and to refine it by means of making necessary exceptions.

Chapter Thirteen: Maslahah Mursalah (Considerations of Public Interest)

Literally, maslahah means 'benefit' or `interest'. When it is qualified as maslahah mursalah, however, it refers to unrestricted public interest in the sense of its not having been regulated by the Law giver insofar as no textual authority can be found on its validity or otherwise. [1. Khallaf, 'Ilm, p. 84.] It is synonymous with istislah, and is occasionally referred to as maslahah mutlaqah.

Technically, maslahah mursalah is defined as a consideration which is proper and harmonious (wasf munasib mula'im) with the objectives of the Lawgiver; it secures a benefit or prevents a harm; and the Shari'ah provides no indication as to its validity or otherwise. [3. Badran, Usul, p. 210.]

The is agreement istislah is not a proof in devotional matters (`ibadat) and the specific injunctions of Shari'ah (muqaddarat), as in the prescribed penalties (hudud) and penances (kaffarat), the fixed entitlements in inheritance (fara'id), etc. But outside these areas, **the majority validated reliance on istislah** as a proof in its own right. [5. Badran, Usul, p. 210.]

[Proofs on Validity of Istislah]

[From the Quran]

Istislah derives its validity from the norm that the basic purpose of legislation (tashri`) in Islam is **to secure the welfare of people**. This is, as al-Shatibi points out, the purport of the Qur'anic ayah in Sura al-Anbiya' (21:107) describing the Prophethood of Muhammad: **`We have not sent you but as a mercy for all creatures.'** In another passage, the Qur'an describes itself, saying: **`O mankind, a direction has come to you from your Lord, a healing for the ailments in your hearts [...]'** (Yunus, 10:75). The ways and means which bring benefit to the people are virtually endless. [6. Shatibi, Muwafaqat, II, 2-3; Sabuni, Madkhal, p. 134.]

[From the Sunnah]

A number of aHadeeth authorise acting upon maslahah, although none is a clear nass.

**`No harm shall be inflicted or reciprocated to Islam'**. [Ibn Majah.] It is argued this Hadeeth encompasses the essence of maslahah in all varieties. [10. Khallaf, `Ilm, p.90.]

'Muslims are bound by their stipulations unless it be a condition which turns a haram into halal or a halal into a haram.' [Abu Dawud.] This grants Muslims the liberty to pursue their benefits provided this does not amount to a violation of Shari'ah.

The practice of Companions, Successors and leading mujtahidun

Abu Bakr, for example, collected the scattered records of Qur'an in a single volume; he also waged war on those who refused to pay zakah; and he nominated `Umar to succeed him. [14. Shatibi, I`tisam, II, 287.]

`Umar b. held his officials accountable for the wealth they accumulate in abuse of public office and expropriated such wealth. He poured away milk to which water had been added. He suspended the execution of

the punishment for theft in a year of famine, and approved of the views of the Companions to execute a group for the murder of one person. [15. Ibn al-Qayyim, I`lam, I, 185.]

`Uthman distributed the authenticated Qur'an and destroyed all variant versions. He validated the right to inheritance of a woman whose husband divorced her to be disinherited.

**`Ali** held craftsmen responsible for the loss of goods in their custody so that traders should take greater care in safeguarding people's property. [16. Shatibi, I'tisam, II, 292, 302; Ibn al-Qayyim, I`lam, I, 182.]

The ulama of various schools validated the interdiction of the ignorant physician, the clowning mufti, and bankrupt trickster. **The Malikis** authorised detention and ta`zir for want of evidence of a person who is accused of a crime. [17. Shatibi, I`tisam, II, 293.]

Ibn al-Qayyim observed, 'siyasah shar'iyyah comprises all measures that bring the people close to well-being (salah) and move them further away from corruption (fasad), even if no authority is found for them in divine revelation and the Sunnah of the Prophet.' [18. Ibn al-Qayyim, Turuq, p. 16.]

The main support for istislah comes from Imam Malik, who argued:

1. The Companions validated it and formulated the rules of Shari'ah on its basis.
2. When the maslahah is compatible with the objectives of the Lawgiver (maqasid al-shari`) or falls within the genus or category of what the Lawgiver expressly validated, it must be upheld. For neglecting it then is tantamount to neglecting the objectives of the Lawgiver.
3. Maslahah is a norm of Shari'ah in its own right; it is by no means extraneous to the Shari`ah.
4. When maslahah is not upheld, the likely result would be hardship. [19. Shatibi, I`tisam, II, 282-287.]

Types of Maslahah

Three, namely, the 'essentials' (daruriyyat), the 'complementary' (hajiyyat), and the `embellishments' (tahsiniyyat). The Shari'ah in all of its parts aims at the realisation of one or the other of these masalih.

Essential masalih are those on which the lives of people depend, and whose neglect leads to total disruption and chaos. They consist of five essential values (al-daruriyyat al-khamsah) namely religion, life, intellect, lineage and property. To uphold the faith would thus require observance of the prescribed forms of 'ibadat, whereas the safety of life and intellect is secured by obtaining lawful means of sustenance as well as the enforcement of penalties. [20. Shatibi, Muwafaqat, II, 3-5; Badran, Usul, p. 208.]

Hajiyyat are on the whole supplementary to the five essential values, and refer to interests whose neglect leads to hardship in the life of the community although not to its collapse. Thus in the area of a 'ibadat the concessions (rukhas) that the Shari`ah has granted to the sick and to the traveler are aimed at preventing hardship. Similarly, the basic permissibility ('ibadah) regarding the enjoyment of victuals and hunting is complementary to the main objectives of protecting life and intellect. [21. Shatibi, Muwafaqat, II, 5.]

Embellishments (tahsiniyyat) denote interests whose realisation lead to the attainment of that which is desirable. Cleanliness in personal appearance and 'ibadat, moral virtues, avoiding extravagance, and moderation in the enforcement of penalties fall within the scope of tahsiniyyat.

Types of Masalih from the Viewpoint of Availability of a Textual Authority

Maslahah which the Lawgiver expressly upheld and enacted a law for its realisation. This is called **al-maslahah al-mu'tabarah**, or accredited maslahah, such as protecting life by enacting the law of retaliation (qisas), or protecting the dignity of the individual by penalising adultery and false accusation. The Lawgiver has, in other words, upheld that each of these offences constitute a proper ground (wasf munasib) for the punishment in question. The ulama agree that promoting such values constitutes a proper ground for legislation. [23. Khallaf, 'Ilm, p. 84.]

Masalih that have been validated after the divine revelation came to an end: the **maslahah mursalah**. Although this too consists of a proper attribute (wasf munasib) to justify the legislation, but since the Lawgiver has neither upheld nor nullified it, it is of a second rank. For example, the maslahah which prompted legislation in many Muslim countries providing that the claim of marriage, or of ownership, can only be proved by means of an official document. [24. Khallaf, 'Ilm, p. 85.]

The third variety of maslahah is the discredited maslahah, or **maslahah mulgha**, which the Lawgiver nullified explicitly or by indication. The ulama agree that legislation in the pursuance of such interests is invalid. An example would be an attempt to give the son and the daughter an equal share in inheritance. [35]

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[35] [Al-Haj: Degrees of relevance

ظهر لي من مطالعة ما ذكره الأصوليون في هذا الباب أن المناسبة درجات خمس فأذكرها من الأقوى إلى الأضعف:

It appears from the analysis of the Usoolis' statements that there are five degrees of relevance between an attribute and a ruling/s. I will mention them in order of their strength:

(1) الوصف المؤثر وهو الذي شهد الشارع لتأثير عينه في عين الحكم: عين الصغر في عين ولاية المال - الإسكار في تحريم الخمر بأنواعه

1- The effective (mu'ath-thir) attribute: the legislator indicated the effect of the particular attribute in the particular ruling.
Ex: Young age in effecting the need for custody over money. Intoxication in prohibition of intoxicant drinks.

(2) الوصف الملائم هو الذي شهد الشارع لتأثير عينه في جنس الحكم أو جنسه في عين الحكم:
عين الصغر في جنس الولاية (قياس النكاح على المال)

2- The fitting (mula'im) attribute: the legislator indicated the effect of the particular attribute in the genus of the rulings or the genus of the attribute in the particular ruling.
Ex: young age in the genus of custody. (here marriage will take the ruling of financial custody.)

تأثير جنس المشقة غير المعتادة في الجمع (لو لم يرد الدليل على الجمع للمطر...)

The effect of undue hardship on combining the prayers.. (Ex: if combining for rain was not reported?)

(3) الوصف المناسب المرسل الملائم وهو المصلحة المرسلة وهو ما شهد الشارع لتأثير جنسه في جنس الحكم: تأثير جنس حفظ الأرواح و الأموال في جنس الأحكام [أو بالأخص أحكام الطريق] إشارات المرور - جنس الفعل المحرم لغرض فاسد في جنس الحكم بمعاملته بخلاف قصده.

3- The proper unrestricted/ open (munasib mursal mula'im): the legislator indicated the effect of the genus of the attribute in the genus of ruling/rulings.
Ex: the effect of the genus of (preserving life and property on the general genus of rulings (or the genus of traffic laws) Traffic lights?
Also, the genus of (prohibited acts) in the genus of (punishing by the opposite of what the sinner intended.)

(4) الوصف المناسب المرسل الغريب لم تشهد الشريعة باعتباره ولا إلغائه.

4- The proper unrestricted/ open alien (munaisb mursal ghareeb) attribute: the legislator neither validated its effect nor invalidated it: Ex: The benefit in eating sweet food before sour! (Why can't we find a better example?)

(5) الوصف الغريب شهدت الشريعة بإلغائه. (المساواة في المواريث)

5- The alien (ghareeb) attribute: the legislator invalidated its effect. (Equity in giving equal shares in inheritance.)

1 و 2 القياس 3 المصلحة المرسلة 4 و 5 لا شيء

1 and 2: Qiyas
3: Maslahah Mursalah
4 and 5: non-consequential.]

Conditions (Shurut) of Maslahah Mursalah

To ensure that maslahah does not become an instrument of arbitrary desire or individual bias in legislation.

1) Must be genuine (haqiqiyyah), as opposed to a specious maslahah (maslahah wahmiyyah). A mere specious conjecture (tawahhum) is not sufficient. There must be a reasonable probability the benefits of enacting a hukm outweigh the harms that might accrue from it. An example of a specious maslahah: to abolish the husband's right of talaq by vesting it entirely in a court of law. [26. Khallaf, 'Ilm, p. 86.] Protecting faith, for example, necessitates the prevention of sedition (fitnah) and propagation of heresy. It also means safeguarding freedom of belief in accordance with **'there shall be no compulsion in religion'** (al-Baqarah, 2:256). [27. Abu Zahrah, Usul, p. 220.]

2) Must be general (kulliyyah) to the people as a whole not a person or group. The concept of Maslahah derives its validity from securing the welfare of the people at large. [28. Badran, Usul, p. 214.]

3) Must not be in conflict with a principle or value upheld by the nass or ijma`. Hence the argument that maslahah would require the legalization of usury (riba) on account of the change in circumstances, comes into conflict with the clear nass of the Qur'an.

Imam Malik added two other conditions:

1. The maslahah must be rational (ma`qulah) and acceptable to people of sound intellect.
2. It must prevent or remove hardship from the people, which is the express purpose of the Qur'anic ayah in sura al-Ma'idah (5:6) quoted above. [30. Shatibi, I`tisam, II, 307-14.]

Furthermore, according to al-Ghazali, maslahah, in order to be valid, must be essential (al-maslahah aldaruriyyah). To illustrate this, al-Ghazali gives the example of when unbelievers in the battlefield take a group of Muslims as hostages. If the situation is such that the safety of all Muslims and their victory necessitates the death of the hostages, then al-Ghazali permits this. [31. Ghazali, Mustasfa, I, 141.] However the weakness of al-Ghazali's argument appears to be that the intended maslahah entails the killing of innocent Muslims, and the Shari'ah provides no indication to validate this. [32. Badran. Usul, pp. 215-16.]

Al-Tufi's View of Maslahah Mursalah

Whereas the majority of jurists do not allow recourse to istislah in the presence of a textual ruling, a prominent Hanbali jurist, Najm al-Din al-Tufi, stands out for his view which authorises it. In a treatise entitled al-Masalih al-Mursalah, which is a commentary on the Hadeeth **`no harm shall be inflicted or reciprocated in Islam'**, al-Tufi argues that this Hadeeth enshrines the first and most important principle of Shari'ah and enables maslahah to take precedence over all other considerations. Al-Tufi precludes devotional matters, and specific injunctions such as the prescribed penalties. As for transactions and temporal affairs (ahkam al-mu'amalat wa al-siyasiyyat al-dunyawiyyah), al-Tufi maintains that if the text and other proofs happen to conform to the maslahah of the people, they should be applied forthwith, but if they oppose it, then maslahah should take precedence. The conflict is really not between the nass and maslahah, but between one nass and another, the latter being the Hadeeth of **la darar wa la dirar fi'l-Islam**. [34. Tufi, Masalih, p. 141; Mustafa Zayd, Maslahah, pp. 238-240.

This book is entirely devoted to an exposition of Tufi's doctrine of Maslahah.] In transactions and governmental affairs, al-Tufi adds, maslahah constitutes the goal whereas the other proofs are like the means; the end must take precedence over the means. [36. Tufi, Masalih, p.141.] In short, al-Tufi's doctrine, as Mahmassani observed, amounts to saying after each ruling of the text, **'Provided public interest does not require otherwise**.**'** [37. Mahmassani, Falsafah al-Tashri`, p. 117.]

Differences between Istislah, Analogy, and Istihsan

In the absence of any ruling in the main sources, the jurist must attempt qiyas. However, if the solution arrived at through qiyas leads to hardship or unfair results, he may depart from it in favour of an alternative analogy in which the 'illah, although less obvious, is conducive to obtaining a preferable solution. The alternative analogy is a preferable qiyas, or istihsan. In the event, however, that no analogy can be applied, the jurist may resort to maslahah mursalah. [38. Cf. Sabuni, Madkhal, pp.134 35.]

It thus appears that maslahah mursalah and qiyas are both applicable to cases on which there is no clear ruling. They are both based on a probability, or zann, either in the form of a 'illah in the case of qiyas, or rational consideration in maslahah. However, they differ in certain respects. The benefit secured by qiyas is founded on an indication from the Lawgiver. But the benefit sought through maslahah has no specific basis.

This explanation also clarifies the main difference between maslahah and istihsan. A ruling which is based on maslahah mursalah does not follow, or represent a departure from, an existing precedent. As for istihsan, it only applies to cases on which there is a precedent available (usually qiyas), but istihsan seeks a departure from it in favour of an alternative ruling. [39. Cf. Badran, Usul, pp. 217.]

The Polemics over Maslahah

Their main point is that the **Shari'ah takes full cognizance of all masalih**. This is the view of the Zahiris and some Shafi'is like al-Amidi, and the Maliki jurist Ibn al-Hajib. When the Shari'ah is totally silent on a matter, it is a sure sign the maslahah in question is no more than a specious maslahah (wahmiyyah). [Khallaf, `Ilm, p.88.]

The Hanafis and most Shafi'is adopted a relatively more flexible stance, maintaining that **masalih are either validated in the explicit nusus, or indicated in the rationale ('illah), or even the general objectives**. The identification of causes (`ilal) and objectives entails the enquiry required in qiyas. The difference between this and the Zahiris is validating maslahah on the basis of the objectives of Shari'ah even in the absence of a specific nass.

Both views maintain that **if maslahah is not guided by values upheld in the nusus there is a danger** of confusing maslahah with arbitrary desires. In sura al-Qiyamah (75:36): **'Does man think that he has been left without guidance?'** The maslahah must therefore be guided by the Lawgiver. [Abu Zahrah, Usul, pp. 221.]

Accepting istislah as independent proof **leads to disparity, even chaos, in ahkam**. This would not only violate the permanent and timeless validity of Shari'ah but open the door to corruption. [45. Khallaf, 'Ilm, p.88.]

Al-Shafi'i approves of maslahah only **within the general scope of qiyas**; whereas **Abu Hanifah** validates it **as a variety of istihsan**. Should there be an authority for maslahah in the nusus, then it will automatically fall

within the scope of qiyas. To maintain maslahah mursalah is a proof would **amount to saying that the nusus are incomplete**. [46. Abu Zahrah, Usul, p. 222.]

The Lawgiver validated certain masalih and overruled others. In between there remain, the maslahah mursalah. It is therefore **equally open to being regarded as valid (mu'tabarah) or invalid (mulghah)**. Since there is no certainty, no legislation may be based on it. In response, it was said that none of these considerations applies to maslahah mursalah, for the benefit in it outweighs its possible harm. Also, the masalih the Lawgiver overruled are few. Masalih mursalah are thus more likely to belong to the part which is more preponderant (kathir al-ghalib), not the limited and rare (qalil al-nadir). [47. Badran, Usul, p. 214.]

As for the reports that the **Companions issued fatwas on the basis of ra'y** which might have partaken in maslahah, Ibn Hazm is categorical in saying 'these reports do not bind anyone'. [49. Ibn Hazm, Ihkam, VI, 40.]

[Examples of Application of Maslahah]

The Malikis and Hanbalis held that maslahah mursalah is authoritative and all that is needed to validate action upon it is to fulfill the conditions which ensure its propriety.

Ahmad b. Hanbal and his disciples are known to have based many of their fatwas on maslahah.

Validated the **death penalty for spies**. Also validated the **death penalty for propagators of heresy** when protecting the community requires this.

VII. As for Imam Malik and his disciples:

1. Imam Malik validated the pledging of **bay`ah (oath of allegiance) to the mafdul**, that is the lesser of the two qualified candidates for the office of the Imam, so as to prevent disorder and chaos afflicting the life of the community.[52. Shatibi, I'tisam, II, 303.]

2. When the Public Treasury (bayt al-mal) runs out of funds, the **Imam may levy additional taxes** on the wealthy so as to meet the urgent needs of the government. [53. Shatibi, I'tisam, II, 295.]

3. If all **means of lawful earning are inaccessible** to a Muslim, and he cannot escape to another place, he may engage in unlawful occupations but only to the extent that is necessary. [54. Shatibi, I'tisam, II, 300.]

Conclusion

The leading ulama of the four schools are in agreement, in principle, that all genuine masalih must be upheld. This is the conclusion Khallaf and Abu Zahrah drew from their investigations.

The Shafi'i and Hanafi approach is the same as the Maliki and Hanbali, with the difference being that the former attempted to establish a **common ground between maslahah and qiyas**.

The Maliki jurist, **al-Qarafi observed that all are essentially in agreement** over the validity of maslahah mursalah. [Qarafi, Furuq, II, 188.]

Since maslahah must always be harmonious with the objectives of the Lawgiver, it is a norm by itself.

Maslahah mursalah as such **specifies the general** (`Amm) of the Qur'an, just as the `Amm of the Qur'an may be specified by qiyas. In the event of conflict between a genuine **maslahah and a solitary Hadeeth**, the former takes priority. [Abu Zahrah, Usul, p. 225.]

Life never ceases to generate new interests. If legislation is confined to the values the Lawgiver expressly decreed, the Shari'ah would inevitably fall short of meeting the masalih of the community. [Khallaf, `Ilm, p. 88.]

As for the concern that validating this doctrine would enable **arbitrary interests** to find their way into Shari'ah, a careful **observance of the conditions** will ensure that only genuine interests, in harmony with the objectives of Shari'ah, qualify. **Combatting the evil of arbitrary indulgence** would surely have greater prospects of success if the mujtahid and the Imam were able to enact the necessary legislation.

Chapter Fourteen: 'Urf (Custom)

[Definition]

[Linguistic Definition]

As a noun derived from its Arabic root 'arafa (to know), 'urf literally means 'that which is known'. In its primary sense, it is the known as opposed to the unknown, the familiar and customary as opposed to the unfamiliar and strange.

**`Urf and 'adah** are largely synonymous, and the majority used them as such. Some, however, distinguished the two, holding that `adah means repetition or recurrent practice, and can be used with regard to both individuals and groups. We refer, for example, to the habits of individuals as their personal `adah, but we do not refer to the personal habits of individuals as their `urf. It is the collective practice of a large number of people that is normally denoted by `urf. The habits of a few or even a substantial minority within a group do not constitute 'urf. [1. Badran, Usul, p. 224.]

[Technical Definition]

'Urf is defined as 'recurring practices which are acceptable to people of sound nature.' Hence recurring practices among some people in which there is no benefit or which partake in prejudice and corruption are excluded. [2. Badran, Usul, p. 224.]

`Urf and its derivative, ma'ruf, occur in the Qur'an. Ma'ruf, which literally means 'known' is, in its Qur'anic usage, is equated with good, while its opposite, the munkar, or 'strange', is equated with evil. The commentators generally interpreted ma'ruf as denoting faith in God and His Messenger, and adherence to God's injunctions. [3. Tabari, Tafsir, (Bulaq 1323-29), IV, 30.] But occasionally, ma'ruf in the Qur'an occurs in the sense of good conduct, kindness and justice, especially when the term is applied to a particular situation. The reason for the position taken by the exegetes becomes apparent if one bears in mind Islam's perspective on good and evil (husn wa-qubh) which are, in principle, determined by divine revelation. [4. Cf. Ziadeh,' 'Urf and Law', p. 62.] This explains why `urf in the sense of custom is not given prominence in the legal theory.

[Scope of Operation]

Custom which does not contravene the principles of Shari'ah is valid and authoritative; it must be observed and upheld by a court of law. According to a legal maxim which is recorded by the Shafi'i jurist al-Suyuti, in his well-known work, al-Ashbah wa al-Nazai'r, 'What is proven by 'urf is like that which is proven by a shar'i proof.' This legal maxim is also recorded by the Hanafi jurist al-Sarakhsi, and was subsequently adopted in the Ottoman Majallah which provides that custom, whether general or specific, is enforceable and constitutes a basis of judicial decisions. [5. The Mejelle (Tyser's trans.) (Art. 36); Abu Zahrah, Usul, p. 216.]

The ulama generally accepted 'urf as a **valid criterion for purposes of interpreting the Qur'an**. To give an example, the commentators referred to `urf in determining the precise amount of maintenance that a husband must provide for his wife. Al-Talaq (65:7): **`Let those who possess means pay according to their means.'**

The rules based in juristic opinion (ra'y) or speculative analogy and ijtihad have often been formulated in the light of prevailing custom; it is therefore, permissible to depart from them if the custom changes.

To deny social change due recognition in the determination of the rules of fiqh would amount to exposing the people to hardship, which the Shari'ah forbids. Sometimes even the same mujtahid changed his previous ijtihad. It is well –known that alShafi`i laid the foundations of his school in Iraq, but when he went to Egypt, he changed some of his earlier views owing to the different customs in Egypt. [7. Abu Zahrah, Usul, p. 217.]

Customs which were prevalent during the lifetime of the Prophet and not expressly overruled by him are known as Sunnah taqririyyah. [8. Ziadeh,' 'Urf and Law ', p. 62.] Islam has thus retained many pre-Islamic Arabian customs while it has at the same time overruled the oppressive and corrupt practices of that society. There are also vestiges of pre-Islamic custom in the area of inheritance, such as the significance that the rules of inheritance attach to the male line of relationship, known as the `asabah. **As for the post-Islamic custom of Arabian society**, Imam Malik has gone so far as to equate the amal ahl al-Madinah, that is the customary practice of the people of Madinah, with ijma`. Custom has also found its way into the Shari'ah through juristic preference (**istihsan**) and considerations of public interest (**maslahah**). And of course, **ijma`** itself has to a large extent served as a vehicle of assimilating customary rules which were in harmony with the Shari'ah, or were based in necessity (darurah), into the general body of the Shari'ah. [9. Badran, Usul, p. 242.]

Conditions of Valid `Urf

In addition to being reasonable and acceptable, `urf must fulfill the following requirements:

1) **`Urf must represent a common and recurrent phenomenon**. The practice of a a limited number of people within a large community will not be authoritative. [Majallah al-Ahkam al-`Adliyyah (Art. 14).] For example, when a person buys a house or a car, the question as to what is to be included in either of these is largely determined by custom, if not specified in the agreement. Also, if there are two distinct customary practices, the one which is dominant is to be upheld. If, for example, a sale is concluded in a city where two currencies are commonly accepted and the contract does not specify any, the more dominant will be deemed to apply. [10. Sabuni, Madkhal, pp. 139-140.]

2) **Must be in existence at the time a transaction is concluded**. This condition is particularly relevant to the interpretation of documents. [11. Sabuni, Madkhal, p. 143.]

3) **Must not contravene the clear stipulation of an agreement**. If for example the prevailing custom in regard to the provision of dower (mahr) in marriage requires the payment of one-half at the time of the conclusion of the contract and the remainder at a later date, but the contract clearly stipulates the prompt payment of the whole, the rule of custom would be of no account. [12. Isma'il, Adillah, p. 400.]

4) **Lastly, custom must not violate the nass**. The opposition of custom to nass may either be absolute or partial. If it is the former, there is no doubt that custom must be set aside. Example: the bedouin practice of disinheriting the female heirs.

But if the custom opposes only certain aspects of the text, then it is allowed to act as a limiting factor on the text. The contract of istisna`, that is, the order for the manufacture of goods at an agreed price, may serve as an example. According to a Hadeeth, **'the Prophet prohibited the sale of non-existing objects but he permitted salam** (i.e. advance sale in which the price is determined but delivery postponed)'. [13. Bukhari, Sahih, III, 44 (Hadeeth nos. 1-3); Badran, Usul, p. 121.] This Hadeeth applies to all varieties of sale in which the object is not present at the time of contract. Salam was exceptionally permitted. The prohibition would apply to istisna' as in this case too the object of sale is non-existent at the time of contract. But since istisna' was commonly practiced among people of all ages, the fuqaha validated it. The conflict between istisna' and the Hadeeth is not absolute, because the Hadeeth validated salam. If benefit to the people was the ground of the concession in respect of salam, then istisna` presents a similar case.

According to a Hadeeth, the Prophet **'forbade sale coupled with a condition'**. An example would be when A sells his car to B for 10,000 dollars on condition that B sells his house to A for 50,000 dollars. However, the majority of Hanafi and Maliki jurists validated conditions which are accepted by the people at large. Here again the general terms of the Hadeeth are qualified by custom. [14. Shawkani, Irshad, p. 161.]

Differences between `Urf and Ijma`

Despite their similarities, there are substantial differences between `urf and ijma`:

1) `Urf materialises by the dominant majority of people and is not affected by the disagreement of a few. Ijma` requires the consensus of all mujtahidun.

2) Custom does not depend on the mujtahidun, but the majority of the people, including the mujtahidun. But, the laymen have no say in ijma'.

3) The rules of `urf are changeable. But once an ijma' is concluded, it precludes fresh ijtihad on the same issue and is not open to abrogation.

4) Lastly, `urf only materialise if it exists over a period of time. Ijma` comes into existence whenever the mujtahidun reach a unanimous agreement.[15. Badran, Usul, p. 225.]

Types of Custom

[Verbal and Actual]

1- Verbal `Urf (Qawli)

Verbal `urf consists of the general agreement of the people on the usage and meaning of words deployed for purposes other than their literal meaning. As a result, the customary meaning tends to become dominant. There are many examples in the Qur'an and Sunnah of words used for a meaning other than their literal one. Words such as salah, zakah and hajj. This usage eventually became dominant. The verbal custom concerning the use of these words thus originated in the Qur'an. We also find instances in the Qur'an where the literal meaning is applied regardless of the customary. The word walad, for example, is used in the Qur'an in its literal sense, that is `offspring' whether a son or daughter (al-Nisa', 4:11), but in its popular usage walad is used for sons only. Whenever words of this nature, that is, words which have acquired a different meaning

in customary usage, occur in contracts, oaths and commercial transactions, their customary meaning will prevail. For example, when a person takes an oath that he will never 'set foot' at so-and-so's house, what is meant by this expression is the customary meaning, namely, actually entering the house. In this sense, the person will have broken the oath if he enters the house while mounted. [16. Badran, Usul, p. 226.]

2- Actual `Urf (Fi'li) (commonly recurrent practices.)

An example of actual 'urf is the give-and-take sale, or bay' al-ta'ati, which is normally concluded without utterances of offer and acceptance. Similarly, customary rules regarding the payment of dower in marriage may require a certain amount to be paid at the time of contract and the rest at a later date.

The validity of this type of custom is endorsed by the legal maxim: **'What is accepted by 'urf is tantamount to a stipulated agreement (al-ma'ruf `urfan ka'l-mashrut shartan).'**

[General and Specific]

`Urf, whether actual or verbal, is once again divided into the two types of general and special: al-urf al`amm and al-'urf al-khass respectively.

1- A general `urf is prevalent everywhere and on which the people agree regardless of the passage of time. A typical example is bay al-ta'ati. Similarly, charging a fixed price for entry to public baths, which is anomalous to the requirements of sale (as it entails consuming an unknown quantity of water). In formulation of istihsan, the Hanafis validated departure from qiyas in favour of general 'urf. [17. Abu Zahrah, Usul, p. 217.]

2- "Special custom" is prevalent in a particular locality, profession or trade. It is not a requirement that it be accepted by people everywhere.

According to the preferred view of the Hanafi school, special 'urf does not qualify the general provisions of the nass. Consequently, this type is ignored when in conflict with the nass.

A ruling of qiyas, especially qiyas whose effective cause is not expressly stated in the nass, that is, qiyas ghayr mansus al-'illah, may be abandoned in favour of a general `urf, but will prevail if it conflicts with special 'urf. A number of prominent ulama, however, held that special 'urf should command the same authority as general 'urf in this respect.

The reason why general 'urf is given priority over qiyas is that the former is indicative of the people's need. Some Hanafis like Ibn al-Humam taught that 'urf in this situation commands an authority equivalent to that of ijma', and that as such it must be given priority over qiyas. It is perhaps relevant here to add that Abu Hanifah's disciple, al-Shaybani, validated the sale of honeybees and silkworms as commonly practiced during his time despite the analogical ruling Abu Hanifah had given against it on the grounds that they did not amount to a valuable commodity (mal). Furthermore, the ulama recorded the view that since 'urf is given priority over qiyas despite the fact that qiyas originates in the nusus, it will a fortiori be preferred over considerations of public interest (maslahah) which are not rooted in the nusus. However, it seems that cases of conflict between general 'urf and maslahah would be rather rare.

[Approved Custom (Sahih) and Disapproved Custom (Fasid)]

And lastly, from the viewpoint of its conformity or otherwise with the Shari'ah, custom is once again divided into approved or valid custom (al-`urf al-sahih) and disapproved custom (al'urf al-fasid).
The approved 'urf : without any indication in the Shari'ah that it contravenes any of its principles.
The disapproved custom: there is evidence to show that it is repugnant to the principles of Shari'ah. [18. Badran, Usul, p. 231.]

Proof (Hujjiyyah) of `Urf

Although the ulama attempted to locate textual authority for 'urf, their attempt has not been free of difficulties. To begin with, reference is usually made to al-Hajj (22:78): **`God has not laid upon you any hardship in religion.'** This is obviously not a direct authority, but it is argued that ignoring `urf is likely to lead to hardship.
The next ayah, al-A'raf (7:199) **'keep to forgiveness, and enjoin `urf, and turn away from the ignorant'**. According to the Maliki jurist al-Qarafi,this ayah provides a clear authority for `urf. [19. Qarafi, Furuq, II, 85.] The generality of ulema, however, maintain that the reference to `urf in it is to the literal meaning of the word, that is, the familiar and good, not to custom as such. But bearing in mind that approved custom is normally upheld by people of sound intellect, the Qur'anic concept of 'urf comes close to the technical meaning. The commentators, however, add that since the word can mean many things: `profession of the faith', `what people consider good', `that which is familiar and known', as well as custom, it cannot be quoted as textual authority for custom as such. [20. Tabari, Tafsir, IV, 30.]
The ulama also quoted the saying of `Abd Allah b. Mas'ud, **'what the Muslims deem to be good is good in the sight of God'**. Although many considered this a Hadeeth, it is more likely a saying of `Abd Allah b. Mas`ud. [21. Shatibi, I'tisam, II, 319.] The critics,however, suggested that this saying/Hadeeth refers to the approval of `al-muslimun', that is, all Muslims, whereas `urf varies from place to place.
The upshot of this debate over the authoritativeness of 'urf seems to be that notwithstanding the significant role it played in Shari'ah, it is not an independent proof in its own right.
The reluctance of the ulama in recognising 'urf as a proof has been partly due to the **circumstantial character of the principle**, in that it is changeable upon changes of conditions of time and place. This would mean that the rules of fiqh formulated in the light of custom would be liable to change. The differential fatwas the later ulama have occasionally given in opposition to those of their predecessors are reflective of the change of custom. [23. Cf. Badran, Usul, p. 233.]

[Change of Ruling upon Change of 'Urf]

The fuqaha of the later ages (muta'akhkhirun) are on record as having changed the rulings of the earlier jurists which were based in custom. The examples below show that the jurists on the whole accepted 'urf not only as a basis of ijtihad but also an indicator of the need for legal reform:

1) Under the rules of fiqh, a man who **causes harm to another by giving him false information** is not responsible for the damage he caused. The rule is that the mubashir, that is, the one who acted directly, is

responsible. However owing to the spread of dishonesty, the later fuquha' validated a departure from this in favour of holding the false reporter responsible. [24. Abu Zahrah, Usul, p.218.]

2) According to Abu Hanifah, when the qadi personally trusts a witness, there is **no need for cross-examination or tazkiyah**. This is based on the Hadeeth **'Muslims are `udul [i.e. upright and trustworthy] in relationship to one another'**. Later experience made the ulama require tazkiyah as a standard practice. [25. Bayhaqi, al-Sunan al-Kubra, X, 155-56. Abu Zahrah, Usul, p. 219.]

3) According to the earlier rule of Hanafi school, no-one was allowed to charge **fees for teaching Qur'an**, or the principles of faith. For teaching them is a form of worship. Subsequent experience showed that incentive was necessary to encourage the teaching of Islam. Consequently the fuqaha' gave a fatwa in favour of charging fees for teaching the Qur'an. [26. Abu Zahrah, Usul, p. 219.]

4) Concerning the **age by which a missing person (mafqud) is to be declared dead**, the generally accepted view, is that he must not be declared dead until he reaches the age at which his contemporaries would normally be expected to die. Consequently the Hanafi jurists variously determined it at seventy, ninety and one hundred; their rulings have taken into consideration the changes of conditions. [27. Sabuni, Madkhal, p.145.]

5) Lastly, the concept of **al-ghabn al-fahish**, that is, radical discrepancy between the market price of a commodity and the actual price charged, is etermined with reference to `urf. [27. Sabuni, Madkhal, p.145.]

Chapter Fifteen: Istishab (Presumption of Continuity)

Literally, Istishab means 'escorting' or companionship'.

Technically, istishab denotes a rational proof which may be employed in the absence of other indications; specifically, those rules of law and reason, whose existence or non-existence had been proven in the past, and are presumed to remain so for lack of evidence to establish a change. So, the past `accompanies' the present without any interruption or change. [1.Ibn al-Qayyim, I'lam, I, 294.]

Istishab is validated by the Shafi'i school, the Hanbalis, the Zahiris and the Shi'ah Imamiyyah, but the Hanafis, the Malikis and the mutakallimun do not consider it a proof in its own right.

The opponents maintain that establishing the existence of a fact in the past is no proof of its continued existence. [2. Shawkani, Irshad, p. 237.]

For the Shafi`is and the Hanbalis, istishab denotes **'continuation of that which is proven** and the negation of that which had not existed'. Istishab, in other words, presumes the continuation of both the positive and the negative until the contrary is established. In its positive sense, istishab requires, for example, that **once a contract of sale, is concluded, it is presumed to remain in force** until there is a change. A mere possibility that the property in question might have been sold is not enough to rebut the presumption of istishab. [3. Ibn al-Qayyim, I'lam, I, 294.] Istishab also presumes the **continuation of the negative**. For example, A purchases a hunting dog from B with the proviso that it has been trained to hunt, but then **A claims that the dog is untrained**. A's claim will be acceptable under istishab unless there is evidence to the contrary. For istishab maintains the natural state of things, which is the absence of training.[4. Badran, Usul, p. 218.]

Istishab is different from the continued validity of a rule of law in a particular case. The false accuser, for example, may never be admitted as a witness, a rule which is laid down in a clear Qur'anic text (al-Nur, 24:5). The permanent validity of this hukm is in no need of any presumption. **Istishab only applies when no other evidence is available**. [5. Badran, Usul, p. 218.]

Since istishab **consists of a probability**, namely the presumed continuity of the status quo ante, it is **not a strong ground for the deduction** of the rules of Shari'ah. Hence when istishab comes into conflict with another proof, the latter takes priority. **As it is, istishab is the last ground of fatwa**.

Should there be doubt over the non-existence of something, it will be presumed to exist, but if the doubt is in the proof of something, the presumption will be that it is not proven. In the case of a missing person, for example, the nature of the situation is such that no other proof of Shari'ah could be employed to determine the question of his life or death. Since the main feature of the doubt concerning a missing person is the possibility of his death, istishab will presume that he is still alive. But in the event of an unsubstantiated claim when, for example, A claims that B owes him a sum of money, the doubt here is concerned with the proof over the existence of a debt, which will be presumed unproven. [6. Shawkani, Irshad, p.237.]

With regard to the determination of the rules, the presumption of istishab is also guided by the general norms of the Shari'ah. The **legal norm concerning foods, drinks, and clothes, for example, is**

permissibility (ibahah). When a question arises as to the legality of a particular kind of beverage or food, and there is no other evidence to determine its value, recourse may be had to istishab, which will presume that it is permissible. **But when the norm in regard to something is prohibition, such as cohabitation between members of the opposite sex,** the presumption will be one of prohibition, unless there is evidence to prove its legality.

Istishab is supported by both shar`i and rational (`aqli) evidences. When reasonable men ('uqala') have known of the existence or non-existence of something, as al-Amidi observes, from that point onwards they tend to formulate their judgement, on the basis of what they know, until they are assured by their own observation or evidence that there is a change.[7. Amidi, Ihkam, IV, 128.] Reason also tells us not to accept claims, unsubstantiated by evidence, that suggest a change in a status quo. To presume the continuity of something which might have been present or absent in the past, as al-Amidi points out, is equivalent to a zann which is valid evidence in juridical (shar'i) matters, and action upon it is justified. [9. Amidi, Ihkam, IV, 127.]

The rules of Shari'ah continue to remain valid until there is a change in the law or in the subject to which it is applied. The Law, for example, has forbidden the consumption of wine, a ruling which will remain in force until there is a state of emergency or the wine loses its intoxicating quality, such as by being changed into vinegar.

Varieties of Istishab

From the viewpoint of the nature of the conditions that are presumed to continue, istishab is divided into four types an follows:

1) Presumption of original absence (istishab al-'adam al-asli), which means that a fact or rule of law which had not existed in the past is presumed to be non-existent. Thus a child and an uneducated person are presumed to remain so until there is a change, for example by attaining majority, or obtaining educational qualifications respectively. Similarly if A, who is a trading partner to B, claims that he has made no profit, the presumption of absence will be in A's favour unless B can prove otherwise. Another area which is determined by the presumption of original absence is the original freedom from liability, or the presumption of innocence, which will be separately discussed later. [10. Shawkani, Irshad, p. 238.]

2) Presumption of original presence (istishab al-wujud al-asli). This variety takes for granted the presence or existence of that which is indicated by the law or reason. For example, when A is known to be indebted to B, A is presumed such until it is proved that he has paid the debt or was acquitted of it. By the same token, a husband is liable to pay his wife the dower (mahr) by virtue of the existence of a valid marriage contract. The ulama are in agreement on the validity of this type of istishab. [11. Khallaf,`Ilm, p.92.]

3) Istishab al-hukm, or istishab which presumes the continuity of the general rules and principles of the law. Istishab thus takes for granted the continued validity of the provisions of the Shari'ah in regard to permissibility and prohibition (halal and haram). Hence when the law is silent on a matter and it is not repugnant to reason it will be presumed to be permissible. This is the majority view, although some Mu'tazilah held a variant opinion, which is that the general norm in Shari'ah is prohibition. The principle of permissibility (ibahah)

originates in the Qur'an. Thus we read in sura al-Baqarah (2:29): `It is He who has created for you all that is in the earth,' Hence all objects, legal acts, contracts and exchange of goods and services which are beneficial to human beings are lawful on grounds of original ibahah. [12. Abu Zahrah, Usul, p. 236.] But when the legal norm in regard to something is prohibition, then istishab presumes its continuity until there is evidence to suggest that it is no longer prohibited.

4) Istishab al-wasf, or continuity of attributes, such as presuming clean water (purity being an attribute) to remain so until the contrary is established. By the same token, a guarantor (kafil - kafalah being a juridical attribute) remains responsible for the debt of which he is guarantor until he or the debtor pays it or when the creditor acquits him from payment. [13. Ibn al-Qayyim, I'lam, I, 295.]

The jurists are in agreement on the validity, in principle, of the first three types of istishab, although they differed in their detailed implementation, as we shall presently discuss. As for the fourth type, it is a subject on which the jurists disagreed. The Shafi'i and the Hanbali schools upheld it absolutely, whereas the Hanafi and Maliki schools accept it with reservations. The case of the missing person is discussed under this variety of istishab, as the question is mainly concerned with the continuity of his life-life being the attribute. Since the missing person (mafqud) was alive at the time when he disappeared, he is presumed to be alive unless there is proof that he has died. He is therefore entitled, under the Shafi'i and Hanbali doctrines, to inherit from a relative who dies while he is still missing. But no-one is entitled to inherit from him for the obvious reason that he is presumed alive. Yet under the Hanafi and Maliki law, the missing person neither inherits from others nor can others inherit from him. The Hanafis and Malikis accept istishab al-wasf only as a means of defense, that is, to defend the continued existence of an attribute, but not as a means of proving new rights and attributes, although his share of inheritance will be reserved for him until the facts of his life or death are established. To use a common expression, istishab can only be used as a shield, not as a sword. If he is declared dead,the reserved share will be distributed among the other heirs. His own estate will be distributed among his heirs as of the time the court declares him dead. [14. Shawkani, Irshad, p. 238.]

The Shafi'is and the Hanbalis have, on the other hand, validated istishab in both its defensive (li-daf) and affirmative (li-kasb) capacities, that is, both as a shield and as a sword. Hence the mafqud is presumed to be alive in the same way as he was at the time of his disappearance right up to the time when he is declared dead. The mafqud is not only entitled to retain all his rights but can acquire new rights such as gifts, inheritance and bequests. [16. Shawkani, Irshad, p. 237.]

It thus appears that the jurists are in disagreement, not necessarily on the principle, but on the detailed application of istishab. The Hanafis and Malikis who accept istishab on a restricted basis have argued that over-reliance in istishab is likely to open the door to conflict in the determination of ahkam. The main area of disagreement is the identification of what exactly the original state which is presumed to continue by means of istishab might be. This is, perhaps, why the Hanbali scholar Ibn al-Qayyim is critical of over-reliance on istishab and of those who have employed it more extensively than they should. [17. Ibn al-Qayyim, I'lam, I, 294.]

The following illustrations, which are given in the context of legal maxims that originate in istishab, also serve to show how the ulama have differed on the application of this doctrine to various issues.

Some of the well-known legal maxims which are founded in istishab may be outlined as follows:

1) Certainty may not be disproved by doubt (al-yaqin la yazul bi'l-shakk). For example, when someone is known to be sane, he will be presumed such until it is established that he has become insane. The presumption can only be set aside with certainty, not by a mere doubt. Similarly, when a person eats in the early morning during Ramadan while in doubt as to the possibility that he might have eaten after dawn, his fast remains intact and no belated performance (qada') is necessary. Night represents certainty whereas daybreak is the state of doubt, and the former prevails. However, the same rule would lead us to a totally different result if it were applied to the situation of a person who ends his fast late in the day in Ramadan while in doubt as to the occurrence of sunset. For the certainty which prevails here is the daytime which is presumed to continue. [18. Badran, Usul, pp. 220-221.] To illustrate some of the difficulties that are encountered in the implementation of the maxim under discussion, we may give in example the case of a person who repudiates his wife by talaq but is in doubt as to the precise terms of his pronouncement: whether it amounted to a single or a triple talaq. According to the majority, only a single talaq takes place. Malik has, on the other hand, held that a triple talaq takes place. The majority view presumes the marriage to be the state of certainty. The marriage is certain and the talaq a doubtful, hence the former is presumed to continue. Malik, on the other hand, considers the occurrence of a divorce to be the certainty in this case. What is in doubt is the husband's right to the revocation of the talaq. As for determining the precise number of talaqs, which is crucial to the question of revocation, Imam Malik holds that the right to revocation cannot be established by a mere doubt. [19. Ibn al-Qayyim, I'lam, I, 296.] While the majority of jurists consider marriage to be the certain factor in this case, for Imam Malik it is the actual pronouncement of talaq, regardless of the form it might have taken, which represents the state of certainty and the basis on which istishab must operate.

2) Presumption of generality until the general is subjected to limitation. The general (`amm) must therefore remain 'amm in its application until it is qualified. Just as a general text remains general until it is specified. [22. Khudari, Usul, p. 356.] While discussing the maxim under discussion, al-Shawkani records the variant view which is held by some ulama to the effect that the rule of law in these situations is established through the interpretation of words and not by the application of istishab. [23. Shawkani, Irshad, p. 238.] What istishab might tell us in this context may be that in the event where there is doubt as to whether the general in the law has been qualified by some other enactment, istishab would presume the absence of specification.

3) Presumption of original freedom from liability (bara'ah al dhimmah al-asliyyah), which means freedom from obligations until the contrary is proved. For example, no-one is required to perform the hajj pilgrimage more than once in his lifetime, or to perform a sixth salah in one day, because the Shari'ah imposes no such liability. Similarly, no-one is liable to punishment until his guilt is established. [25. Shawkani, Irshad, p. 238.] However, the detailed implementation of this principle too has given rise to disagreement between the Shafi'i and Hanafi jurists. To give an example, A claims that B owes him fifty dollars and B denies it. The question may arise as to whether a settlement (sulh) after denial is lawful in this case. The Hanafis have answered this in the affirmative, but the Shafi'is have held that a settlement after denial is not permissible. The Shafi'is argue that since prior to the settlement B denied the claim, the principle of original freedom from liability would thus apply to

him. The Hanafis have argued, on the other hand, that B's non-liability after the claim is not inviolable. The claim, in other words, interferes with the operation of the principle under discussion. B can no longer be definitely held to be free of liability; this being so, a settlement is permissible in the interests of preventing hostility. [26. Zuhayr, Usul, IV, 180-l81.]

4) Permissibility is the original state of things (al-asl fi al-ashya' al-ibahah). All matters which the Shari'ah has not regulated to the contrary remain permissible. The one exception to the application of ibahah is relationships between members of the opposite sex, where the basic norm is prohibition unless it is legalised by marriage. The Hanbalis have given ibahah greater prominence, in that they validate it as a basis of commitment (iltizam) unless there is a text to the contrary. Under the Hanbali doctrine, the norm in `ibadat is that they are void (batil) unless there is an explicit command to validate them. But the norm in regard to transactions and contracts is that they are valid unless there is a nass to the contrary. [27. Ibn al-Qayyim, I`lam, I, 300.] To give an example, under the Hanbali doctrine of ibahah, prospective spouses are at liberty to enter stipulations in their marriage contract, including a condition that the husband must remain monogamous. The Hanbalis are alone in their ruling on this point, as the majority of jurists have considered such a condition to amount to a superimposition on the legality of polygamy. The provisions of the Shari'ah must, according to the majority, not be circumvented in this way. The Hanbalis argued, on the other hand, that the objectives of the Lawgiver in regard to marriage are satisfied by monogamy. As it is, polygamy is a permissibility, not a requirement, and there is no nass to indicate that the spouses could not stipulate against it.

Conclusion

Istishab is not an independent proof or a method of juristic deduction in its own right, but mainly functions as a means of implementing an existing indication (dalil). This might explain why the ulama have regarded istishab as the last ground of fatwa. The Malikis relied very little on it as they are known for their extensive reliance on other proofs, revealed and rational, so much so that they had little use for istishab. This is also true of the Hanafi school.

It is interesting to note in this connection the fact that istishab is **more extensively applied by those who are particularly strict in their acceptance of other rational proofs**. Thus we find that the opponents of qiyas, such as the Zahiris and the Akhbari branch of the Shi'ah Imamiyyah, have relied on it most and determined the ahkam on its basis in almost all instances where the majority applied qiyas. Similarly the Shafi`is who reject istihsan relied more frequently on istishab. In almost all cases where the Hanafis and Malikis have applied istihsan or custom ('urf), the Shafi'is have resorted to istishab. [28. Cf. Abu Zahrah, Usul, p. 241.]

The **application of istishab to penalties and to criminal law in general is to some extent restricted** by the fact that these areas are mainly governed by the definitive rules of Shari'ah. The jurists have on the whole advised caution in the application of penalties on the basis of presumptive evidence. Having said this, however, the principle of the original absence of liability is undoubtedly an important feature of istishab which is widely upheld not only in the field of criminal law but also in constitutional law and civil litigations generally. This is perhaps equally true of the principle of ibahah, which is an essential component of the principle of legality, also known as

the principle of the rule of law. This feature of istishab is once again in harmony with the modern concept of legality in that permissibility is the norm in areas where the law imposes no prohibition.

I shall end this chapter by summarising a reformist opinion concerning istishab. In his booklet entitled Tajdid Usul al-Fiqh al-Islami, Hasan Turabi explains that istishab has the potential of incorporating within its scope the concept of natural justice and approved customs. According to Turabi, istishab derives its basic validity from the belief that Islam did not aim at establishing a new life on earth in all details, nor did it aim at replacing all the customs of Arabian society. We also find in the Qur'an references to amr bi al-'urf, or acting in accordance with the prevailing custom unless it has been specifically nullified. Similarly when the Qur'an calls for the implementation of justice and beneficence (ihsan) in the determination of disputes, it refers, among other things, to the basic principles of justice upheld by humanity at large. Life on earth is thus a cumulative construct of moral and religious teachings, aided and abetted by enlightened human nature. The Shari'ah also left many things unregulated, and when this is the case human action may in regard to them be guided by good conscience and the general teachings of divine revelation. In its material part istishab declares permissibility to be the basic norm in Shari'ah. It thus appears that istishab, as a proof of Shari'ah, merits greater recognition than we find to be the case in the classical formulations of this doctrine. [29. Turabi, Tajdid, pp. 27-28.]

Chapter Sixteen: Sadd al-Dhara'i` (Blocking the Means)

[Definition]

Dhari'ah (pl. dhara'i') is synonymous with wasilah, which signifies the means to a certain end, while sadd means `blocking'. Sadd al-dhara'i` thus implies **blocking the means to an expected end which is likely to materialise if the means is not obstructed**. It implies blocking the means to evil, not to something good.

Although the literal meaning of sadd al-dhara'i` might suggest otherwise, in its juridical application,the concept extends to **`opening the means to beneficence'**. This meaning is not particularly highlighted, presumably because opening those means is the function of the Shari'ah as a whole. When the means and the end are both directed toward beneficence and are not explicitly regulated by a nass, the matter is likely to fall within the ambit of qiyas, maslahah, or istihsan, etc.

Similarly, when both the means and the end are directed towards evil, the issue is likely to be governed by the general rules of Shari'ah, and a recourse to sadd al-dhara'i' would seem out of place. Based on this analysis, it would appear that as a principle of jurisprudence, **sadd al-dhara'i' applies when there is a discrepancy between the means and the end on the good-neutral-evil scale of values**.

A typical case for the application of sadd al-dhara'i` would thus arise when a **lawful means is expected to lead to an unlawful result**.

[Dhari'a will be forbidden regardless of the intention of the doer or actual materialization of the end.]

For example, khalwah or illicit privacy between members of the opposite sexes, is unlawful because it constitutes a means to zina whether or not it actually leads to it.

Also, there is a Qur'anic text which forbids the Muslims from insulting idol worshippers, notwithstanding the actual intention behind it. The text thus proceeds: **'And insult not the associators lest they [in return] insult God out of spite and ignorance'** (al-An'am; 6:108). The means is obstructed by banning insulting idol-worshippers, a conduct which might have been otherwise praiseworthy. [1. Cf. Abu Zahrah, Usul, p. 228.]

The doctrine of sadd al-dhara'i` contemplates the basic objectives of the Lawgiver. Hence the general rule regarding the value of the means in relationship to the end is that **the former acquires the value of the latter**.

Normally the means to wajib become wajib and the means to haram become haram.

Means may at times lead to both a good and an evil in which case, if the evil (mafsadah) is either equal to or greater than the benefit (maslahah), the former will prevail over the latter. This is according to the general principle that **'preventing an evil takes priority over securing a benefit'**. [3. Shatibi, Muwafaqat (Diraz edition),IV, 195.]

Sadd al-dhara'i` thus becomes a principle of jurisprudence and a method of deducing the juridical ruling (hukm shar`i) of a certain issue or type of conduct which may not have been regulated in the existing law.

[Proof-value of Sadd al-Dhara'i`]

In addition to the Qur'anic ayah (al-An'am, 6:108) on the prohibition of insulting idols as referred to above, authority is also found for the principle of sadd al-dhara'i' in the Sunnah, especially the ruling in which the **Prophet forbade a creditor from taking a gift from his debtor** lest it became a means to usury and the gift a substitute to riba. The **Prophet also forbade the killing of hypocrites** (al-munafiqun) and people who were known to have betrayed the Muslim community during battles. It was feared that killing such people would become a means to evil, namely, of giving rise to a rumour that 'Muhammad kills his own Companions' [5. Shatibi, Muwafaqat, IV, 62.] On a similar note, the **Prophet suspended enforcement of the hadd penalty for theft during battles** so as to avoid defection to enemy forces. [6. Abu Zahrah, Usul, p. 229.]

It is also reported that during the time of the **Umar**, one of his officials, **Hudhayfah**,married a Jewish women in al-Mada'in. The caliph wrote to him saying that he should divorce her. Hudhayfah then asked the caliph if the marriage was unlawful. To this the Caliph replied that it was not,but that his example might be followed by others who might be lured by the beauty of the women of ahlal-dhimmah. The caliph thus forbade something which the Qur'an had declared lawful so as to block the means to an evil as he perceived it. **Ibn Qayyim** records at least seventy-seven instances of the learned Companions and subsequent generations of ulama in which they resorted to sadd al-dhara'i `. [7. Ibn Qayyim al-Jawziyyah, I`lam, III, 122ff.]

[Disagreement over Sadd al-Dharai']

The **Hanafi** and **Shafi'i** jurists do not recognise it as a principle in its own right, on the grounds that the necessary ruling regarding the means can be derived by recourse to other principles such as qiyas, and the Hanafi doctrines of istihsan and 'urf. The **Maliki** and **Hanbali** jurists validated it as a proof in its own right.

Al-Shatibi concluded that the ulama of various schools are essentially in agreement over the conceptual validity of sadd al-dhara'i` but differed in its detailed application. [8. Shatibi, Muwafaqat, IV, 201.]

[Classification of Sadd al-Dhara'i']

From the viewpoint of the degree of probability that a means is expected to lead to an evil end:

1) Means which definitely lead to evil, such as digging a deep pit next to the entrance door to a public place which is not lit at night. The ulama of all schools are, in principle, unanimous on the prohibition of this type of dhari'ah. [10. Abu Zahrah, Usul, p. 228.]

2) Means which is most likely to lead to evil (al-zann al ghalib) and is rarely, if ever, expected to lead to a benefit. **Ex: selling weapons during warfare or grapes to a wine maker**. Although al-Shatibi noted that these transactions are invalid according to the consensus, Abu Zahrah and Badran noted that it is only the Maliki and Hanbali ulama who considered them forbidden. [12. Abu Zahrah,Usul, p. 231.]

3) Means which frequently leads to evil, but in which there is no certainty, nor even a dominant probability, that this will always be the case.

Ex: a sale which is used as a means to procuring usury (riba). Buyu' al-ajal (deferred sales), in which either the delivery of the object of sale, or the payment of its price, is deferred, fall under this category. If, for example, A sells a garment for ten rials to B with the price being payable in six months, and A then buys the same garment from B for eight rials with the price being payable immediately, this in effect amounts to a loan of eight rials to B on which he pays an interest of two rials after six months. There is a dominant probability this sale would lead to riba although there is an element of uncertainty, which is why the ulama disagreed as to the validity of this transaction. **Malik** and **Ahmad** held that the means which are likely to lead to usury are haram and must be obstructed. **Abu Hanifah** and **al-Shafi'i** ruled that unless it definitely leads to evil, the basic legality must be held to prevail. The preferred view, however, is that of the Maliki and Hanbali schools, for there is evidence in the Sunnah to the effect that original permissibility may be overruled in the face of a likelihood (or customary practice), even without definite evidence, that it might open the way to evil. [13.Shatibi, Muwafaqat, IV, 200.]

Another example: the validity or otherwise of a **marriage that is concluded with the intention of merely satisfying one's sexual desire** without a life-long commitment. Imam **Malik** considers this to be invalid (batil), as the norm in marriage is permanence. The thrust of this view is to prevent the likely abuse to which the marriage in question is likely to lead. Imam **Shafi`i** has on the other hand held that the nikah is valid so long as there is nothing in the contract to vitiate it. The Shari'ah, according to this view, cannot operate on the hidden intentions but the tangible facts susceptible to proof. [14. Isma'il, Adillah, p. 175.]

Another example: the ruling, disputed by some, that **close relatives may neither act as witnesses nor as judges in each other's disputes**. Likewise, a judge may not **adjudicate a dispute on the basis of his personal knowledge** of facts without the formal presentation of evidence, lest it lead to prejudice in favour or against one of the parties. The Hanafis on the other hand maintain, particularly in reference to adjudication on the basis of personal knowledge, that it is lawful. [17. Shalabi, Fiqh,p. 186.]

4) Means which are rarely expected to lead to evil. An example would be to **dig a water well in a place which is not likely to cause harm** to anyone, or **speaking a word of truth to a tyrannical ruler** or **growing grapes**. Although there is a possibility that a mafsadah might be caused as a result, the ulama are generally in agreement on the permissibility of this type of means. The basic norm in regard to acts and transactions is permissibility, and no one may be prevented from attempting them on account of mere possibility.

[Haram May Be Turned into Halal]

The application of sadd al-dhara'i' also **covers the eventuality where a haram may be turned into halal or mubah if this is likely to prevent a greater evil**. A lesser evil is, in other words, tolerated in order to prevent a greater one. Ex: it is permissible **to seek the release of Muslim prisoners of war in exchange for a ransom**. To give money to the warring enemy is unlawful as it adds strength to the enemy. This ruling is based in the principle of sadd al-dhara'i', and consists of opening, rather than blocking, the means to the desired benefit. Furthermore, the ulama generally held that **giving bribes** is permissible if it is the only way to prevent oppression, and the victim is otherwise unable to defend himself. [19. Abu Zahrah, Usul, p. 232.]

[Over-Reliance on Sadd Al-Dhara'i`]

Notwithstanding the essential validity of sadd al-dhara'i' as a principle of Shari'ah, over-reliance on it is not recommended. The ulama cautioned that an excessive use of this principle may render the lawful (mubah) or even the praiseworthy (mandub) and the obligatory (wajib) unlawful. An example of this would be when an upright person refuses to take custody of the property of the orphan for the pious motive of avoiding the possibility of incurring a sin. The Maliki jurist **Ibn al-'Arabi** said that the application of this principle **should be regulated to ensure propriety** and moderation in its use. [20. Abu Zahrah, Usul, p. 233.]

[Distinguishing the Means from the Preliminary(muqaddimah)]

A 'preliminary' consists of something which is necessary for obtaining the result it contemplates, in the sense that the latter cannot materialise without the former. For instance, ablution (wudu') is a preliminary to salah. Although the means is normally expected to lead to the end it contemplates, the latter may also be obtained through some other means.

To give an example: traveling in order to commit a theft is a preliminary to the theft that it contemplates but not a means to it. Traveling is basically neutral and cannot, on an objective basis, be said to constitute a means to theft. But seductive overtures between members of the opposite sexes are a means, but not a preliminary, to adultery, as the latter can materialise even without such overtures.

The other difference to note between the means and the preliminary for our purposes, is, as already indicated, that the former is usually evaluated and declared unlawful on an objective basis even without the realisation of its expected end. The preliminary to an act, on the other hand, is of little value without the actual occurrence of the act of which it becomes a part. Walking in the direction of a mosque to perform the Friday prayers, for example, can only acquire the value of the wajib if it actually leads to the performance of the prayers, not otherwise. [21. Cf. Badran, Usul, pp. 245-246.]

Chapter Seventeen: Hukm Shar`i (Law or Value of Shari'ah)

The ulama of usul define **hukm shar`i** as a locution or **communication from the Lawgiver concerning the conduct of the mukallaf** (person in full possession of his faculties) which consists of a demand, an option or an enactment. A demand (talab, or iqtida') is usually communicated in the form of either a command or a prohibition.

A demand may either be binding or not. When a demand to do or not to do something is established by definitive proof (dalil qat'i) it is referred to as wajib or haram respectively. Such is the majority view, but according to the Hanafi jurists, if the text which conveys such a demand is not definitive in its meaning (dalalah) or authenticity (thubut), it is wajib, but if it is definitive in both respects, it is fard. As for the demand to avoid doing something, the Hanafis maintain that if it is based on definitive proof in terms of both meaning and authenticity, it is haram, otherwise it is makruh tahrimi.

When a demand is not utterly emphatic and leaves the individual with an element of choice it is known as mandub (recommended).

The option (takhyir), on the other hand, is a variety of hukm shar'i which leaves the individual at liberty either to do or to avoid doing something. A hukm of this kind is commonly known as mubah (permissible).

**An enactment, or wad`**, is neither a demand nor an option,but an objective exposition of the law which enacts something as a cause (sabab) or a condition (shart) of obtaining something else; or it may be conveyed in the form of a hindrance (mani`) that might operates an obstacle against obtaining it. [1. Ghazali, Mustasfa, I, 42.]

To give some **examples**, the Qur'anic command which addresses the believers to **`fulfill your contracts'** (al-Ma'idah, 5:1) is a speech of the Lawgiver addressed to the mukallaf which consists of a particular **demand**.

To illustrate a hukm which conveys an **option**, we refer to al-Baqarah (2:229) which provides: **`If you fear that they [i.e. the spouses] would be unable to observe the limits set by God, then there would be no sin on them if she gives a consideration for her freedom.'** The married couple are thus given the choice to incur a divorce by mutual consent, known as khul', if they so wish, but they are under no obligation if they do not.

The following Hadeeth also conveys a hukm in which the individual is given a choice. The Hadeeth reads: **'If any of you sees something evil, he should set it right by his hand; If he is unable to do so, then by his tongue; and if he is unable to do even that, then within his heart- but this is the weakest form of faith.'** [2. Muslim, Sahih Muslim, p.16, Hadeeth no.34.] Here the choice is given according to the ability of the mukallaf and the circumstances which might influence his decision.

Lastly, to illustrate a hukm which consists of an **enactment (wad')** we may refer to the Hadeeth which provides that **'the killer does not inherit'**. [3. Shafi'i, Risalah, p. 80; Ibn Majah, Sunan, II, 913, Hadeeth no.2735.] This is a speech of the Lawgiver concerning the conduct of the mukallaf which is neither a demand nor an option but an objective ruling of the law that envisages a certain eventuality.

The ulama of usul have differed with the fuqaha' in regard to the identification of hukm shar`i. To refer back to the first example where we quoted the Qur'an concerning the fulfillment of contracts; according to the ulama of usul, the text itself, that is, the demand which is conveyed in the text, represents the hukm shar'i. However, according to the fuqaha', it is the effect of that demand, namely the obligation (wujub) that it conveys which embodies the hukm shar`i. Having explained this difference of perspective between the ulama of usul and the fuqaha', it will be noted, however, that it is of no practical consequence. [4. Khallaf, `Ilm, 100.]

[Varities of Hukm shar'i]

Hukm shar'i is divided into the two main varieties of al-hukm al-taklifi (defining law) and al-hukm alwad'i (declaratory law). The former consists of a demand or an option, whereas the latter consists of an enactment only. `Defining Law' is a fitting description of al-hukm al-taklifi, as it mainly defines the extent of man's liberty of action. Al-hukm al-wad'i is rendered 'declaratory law', as this type of hukm mainly declares the legal relationship between the cause (sabab) and its effect (musabbab) or between the condition (shart) and its object (mashrut)

Defining law may thus be described as a locution or communication from the Lawgiver which demands the mukallaf to do something or forbids him from doing something, or gives him an option between the two. This hukm occurs in the well-known five categories of wajib (obligatory), mandub (recommended), haram (forbidden), makruh (abominable) and mubah (permissible).

Declaratory law is also subdivided into the five categories of sabab (cause), shart (condition), mani' (hindrance), `azimah (strict law) as opposed to rukhsah (concessionary law), and sahih (valid) as opposed to batil (null and void).[6. Khallaf, `Ilm, p. 101.]

Defining Law (al-hukm al-Taklifi)

I.1 The Obligatory (Wajib, Fard)

For the majority of ulema, wajib and fard are synonymous, and both convey an imperative and binding demand of the Lawgiver addressed to the mukallaf in respect of doing something. Acting upon something wajib leads to reward, while omitting it leads to punishment in this world or in the hereafter.

The Hanafis have, however, drawn a distinction between wajib and fard. An act is thus obligatory in the first degree, that is, fard, when the command to do it is conveyed in a clear and definitive text of the Qur'an or Sunnah. But if the command to do something is established in a speculative (zanni) authority, such as an Ahad Hadeeth, the act would be obligatory in the second degree (wajib). The obligatory commands to perform the salah, the hajj, and to obey one's parents are thus classified under fard, as they are each established in a definitive text of the Quran. But the obligation to recite sura al-Fatihah in salah, or to perform salat al-witr, that is, the three units of prayers which conclude the late evening prayers (salat al-'isha'), are on the other hand classified under wajib, as they are both established in the authority of Hadeeth whose authenticity is not completely free of doubt. A Muslim is bound to do acts which are bligatory either in the first or in the second degree; if he does them, he secures reward and spiritual merit, but if he willfully neglects them, he makes himself liable to punishment.

The difference between the two classes of obligations, according to the vast majority of the jurists, including the Hanafis, is that the person who refuses to believe in the binding nature of a command which is established by definitive proof becomes an unbeliever, but not if he disputes the authority of an obligatory command of the second degree, although he becomes a transgressor. Thus to neglect one's obligation to support one's wife, children and poor parents amounts to a sin but not to infidelity.

Another consequence of the distinction between fard and wajib is that when the former is neglected in an act required by the Shari'ah, the act as a whole becomes null and void (batil). If. for example, a person leaves out the bowing (ruku`) or prostration (sajdah) in obligatory prayers, the whole of the prayer becomes null and void. But if he leaves out the recitation of al-Fatihah, the salah is basically valid, albeit deficient. This is the Hanafi view, but according to the majority the salah is null and void in both cases.

However, the difference between the Hanafis and the majority in this respect is regarded as one of form rather than substance, in that the consequences of their disagreement are on the whole negligible. [8. Abu Zahrah, Usul, pp. 23-24.]

VIII. [Varieties of Wajib]

Wajib is sub-divided into at least three varieties, the first of which is the division of wajib into

I. Personal ('Ayni) and Collective (Kafa'i)

Wajib `ayni is addressed to every individual sui juris and cannot, in principle, be performed for or on behalf of another person. Examples of wajib (or fard) 'ayni are salah, hajj, zakah, fulfillment of ontract and obedience to one's parents.

Wajib kafa'i consists of obligations that are addressed to the community as a whole. If only some members of the community perform them, the law is satisfied and the rest of the community is absolved of it. The merit (thawab), however, only attaches to those who have actually taken part in discharging the wajib kafa'i. For example, the duty to participate in jihad (holy struggle), funeral prayers, the hisbah, (promotion of good and prevention of evil), building hospitals, extinguishing fires, giving testimony and serving as a judge, etc., are all collective obligations of the community, and are thus wajib (or fard) kafa'i.

The collective obligation sometimes changes into a personal obligation. This is, for example, the case with regard to jihad, which is a wajib kafa'i, although when the enemy attacks and besieges a locality it becomes the personal duty of every resident to defend it. Similarly, when there is only one mujtahid in a city, it becomes his personal duty to carry out ijtihad. [10. Khallaf, 'Ilm, p. 109.]

II. Wajib Muwaqqat ‘Contingent’ and Wajib Mutlaq ‘Absolute’

Wajib muwaqqat is contingent on a time-limit and wajib mutlaq, that is, 'absolute wajib', is free of such a limitation. Fasting and the obligatory salah are examples of contingent wajib, as they must each be observed within specified time limits. But performing the hajj or the payment of an expiation (kaffarah) are not subject to such restrictions and are therefore absolute wajib. Provided that one performs the hajj once during one's lifetime and pays the kaffarah at any time before one dies, the duty is discharged.

Furthermore, the **absolute wajib** is called absolute because there is no time-limit on its performance and it **may be fulfilled every time whenever the occasion arises**. This is, for example, the case regarding one's duty to obey one's parents, or the obligation to carry out hisbah, namely, to promote good and to prevent of evil as and when the occasion arises. A consequence of this division is that wajib muwaqqat materialises only when the time is due for it; it may neither be hastened nor delayed, but within the given time limits the mukallaf has a measure of flexibility. Furthermore, to fulfill a contingent wajib it is necessary that the mukallaf have the intention (niyyah) specifically to discharge it. [12. Khudari, Usul, p.33.]

III. Quantified Wajib (Wajib Muhaddad) and Unquantified Wajib (Wajib Ghayr Muhaddad)

An example of the former is salah, zakah, payment of the price (thaman) by the purchaser in a sale transaction, and payment of rent in accordance with the terms of a tenancy agreement, all of which are quantified. Similarly, the prescribed penalties (hudud).

The unquantified wajib may be illustrated by reference to one's duty to support one's close relatives, charity to the poor, feeding the hungry, paying a dower, (mahr) to one's wife, the length of standing (qiyam), bowing and prostration in salah. Consequently, the mukallaf, be it the individual believer, qadi or imam, determines the quantitative aspect of the wajib. [13. Ghazali, Mustasfa, I, 47.]

If the quantified wajib is not discharged within the given time-limit, it constitutes a **liability** on the person (dhimmah) of the individual, as in the case of unpaid zakah or debt. Failure to discharge a wajib ghayr muhaddad, on the other hand, does not result in a personal liability.

[The Means to a Wajib]

It would be inaccurate to say that a means to a wajib is also a wajib is also wajib in every case. For such a view would tend to ignore the personal capacity of the mukallaf: for example, when the Friday congregational prayer cannot be held for lack of a large number of people in a locality. It would be more accurate to say that when the means to wajib consist of an act which is within the capacity of the mukallaf then that act is also wajib. [15. Ghazali, Mustasfa,, I, 46.]

The distinction between wajib and mandub is, broadly speaking, based on the idea that ignoring the wajib entails punishment (`iqab) while ignoring the mandub does not. The distinction between haram and makruh is based on a similar criterion: if doing something is punishable, it is haram, otherwise it is makruh. This is generally correct, but one must add the proviso that punishment is not a necessary requirement of a binding obligation, or wujub. When God Almighty renders an act obligatory upon people without mentioning a punishment for its omission, the act which is so demanded is still wajib. [16. Ghazali, Mustasfa, I, 42.]

I.2 Mandub (Recommended)

Mandub denotes a demand of the Lawgiver which asks the mukallaf to do something which is, however, not binding on the latter. To comply with the demand earns the mukallaf spiritual reward (thawab) but no punishment is inflicted for failure to perform. Creating a charitable endowment (waqf), for example, giving alms to the poor, fasting on days outside Ramadan, attending the sick, etc., are duties of this kind. Mandub is variously known as

Sunnah, mustahabb and nafl, which are all here synonymous and covered by the same definition. [17. Ghazali, Mustasfa, I, 42.]

If it is an act which the Prophet has done at one time but omitted at other times, it is called Sunnah.

There are two types of Sunnah, namely **Sunnah mu'akkadah** (the emphatic Sunnah, also known as Sunnah al-huda), and **Sunnah ghayr mu'akkadah**, or supererogatory Sunnah. The call to congregational prayers (i.e. the adhan), attending congregational prayers, whereas non-obligatory charity, and supererogatory prayers preceding the obligatory salah in late afternoon ('asr) are examples of supererogatory Sunnah.

Performing the emphatic Sunnah leads to spiritual reward from Almighty God while its neglect is merely blameworthy but not punishable. However, if the entire population of a locality agree to abandon the emphatic Sunnah, they are to be fought for contempt of the Sunnah. To perform the supererogatory Sunnah, on the other hand, leads to spiritual reward while neglecting it is not blameworthy.

There is a third variety of Sunnah known as Sunnah al-zawa id, which mainly refers to the acts and conduct performed by the Prophet as a human being, such as his style of dress and choice of food, etc., whose omission is neither abominable nor blameworthy. [18. Khudari, Usul, p.46.]

Mandub often occurs in the Qur'an in the form of a **command** which is then accompanied by indications to suggest it only conveys a recommendation. An example of this is the Qur'anic command which requires that giving and taking of period loans must be set down in writing (al-Baqarah, 2:282). But the subsequent portion of the same passage provides that **`if any of you deposits something with another, then let the trustee [faithfully] discharge his trust'**. This implies that if the creditor trusts the debtor, they may forego the documentation. But in the absence of such accompanying evidence in the text itself, the Qur'anic command is sometimes evaluated into mandub by reference to the general principles of the Shari'ah.

Sometimes the mandub is conveyed in **persuasive language** rather than as a command per se. An example of this is the Hadeeth which provides: **`Whoever makes an ablution for the Friday prayers, it is good, but if he takes a bath, it is better -[afdal]**. [19. Tabrizi, Mishkat, I, 168, Hadeeth no. 540.]

The Hanafis held that once the mandub is commenced, it turns into an obligation and must be completed. For example, when a person starts a supererogatory fast, according to this view, it is obligatory that he complete it, and failure to do so renders him liable to the duty of belated performance (qada'). But according to the Shafi'is, whose view here is generally preferred, the mandub is never turned into wajib, thereby leaving the person who has started it with the choice of discontinuing it whenever he wishes. [20. Ghazali, Mustasfa, I, 48.]

I.3 Haram (Forbidden)

To the majority, haram (also known as mahzur) is a binding demand of the lawgiver in respect of abandoning something, which may be founded in a definitive or a speculative proof. Committing haram is punishable and omitting it is rewarded. To the Hanafis, haram is a binding demand to abandon something which is established in definitive proof; if it is founded in speculative evidence, it constitutes makruh tahrimi, not haram. Committing both is punished and omitting them is rewarded. But they differ insofar as the willful denial of the haram only leads to infidelity. [21. Qasim, Usul, p. 225.]

The textual evidence for haram occurs in a variety of forms, summarised as follows:

Firstly, the text may dearly **use the word haram or any of its derivatives**. For example, the Qur'anic text which provides, **'forbidden to you [hurrimat 'alaykum] are the dead carcass, blood and pork'** (alMa'idah, 5:3). Similarly, the Hadeeth, **'everything belonging to a Muslim is forbidden [haram] to his fellow Muslims: his blood, his property and his honour'**. [22. Muslim, Sahih Muslim, p. 473, Hadeeth no. 1775.]

Secondly, haram may be conveyed in **other prohibitory terms** which require the avoidance of a certain form of conduct. For example, there is the Qur'anic text which provides, **'slay not [la taqtulu] the life that God has made sacrosanct, save in the course of justice'** (al-Ma'idah, 5:90).

Thirdly, haram may be communicated in the form of a **command to avoid** a certain conduct. For example: there is the Qur'anic text which provides that wine-drinking and gambling are works of the devil and then orders the believers to **'avoid it'** (al-Ma'idah, 5:90).

Fourthly, haram may be communicated through expressions **such as 'it is not permissible'** or **'it is unlawful'** in a context which is indicative of total prohibition. For example, the Qur'anic text which proclaims that **`it is not permissible for you [la yahillu lakum] to inherit women against their will'** (al-Nisa', 4:19), or the Hadeeth which provides **'it is unlawful [la yahillu] for a Muslim to take the property of another Muslim without his consent'**. [23. Bayhaqi, al-Sunan al-Kubra, III, 10.]

Fifthly, haram is also identified by the enactment of a **punishment for a certain form of conduct**. The hudud penalties are the most obvious examples of this variety.

Alternatively, the text which communicates tahrim may only consist of an **emphatic condemnation** of a certain act without specifying a penalty for it as such. **'Those who eat up the property of orphans swallow fire into their own bodies; they will soon be enduring a blazing fire'** (al-Nisa', 4:10).

Haram is divided into two types:

(a) haram li-dhatih or `that which is forbidden for its own sake', such as theft, murder, adultery, and marrying a close relative, all of which are forbidden for their inherent enormity; and

(b) haram li-ghayrih, or 'that which is forbidden because of something else'. An act may be originally lawful but has been made unlawful owing to the presence of certain circumstances. For example: a marriage which is contracted for the sole purpose of tahlil, that is, in order to legalise another intended marriage, performing salah in stolen clothes, and making an offer of betrothal to a woman who is already betrothed.

Haram lidhatih is null and void ab initio (batil), whereas violating a prohibition which is imposed owing to an extraneous factor is fasid (irregular) but not batil, and as such may fulfill its intended legal purpose. A marriage which is contracted for the purpose of tahlil is clearly forbidden, but it validly takes place nevertheless. Similarly, a contract of sale which is concluded at the time of the Friday prayer is haram li-ghayrih. But according to the majority of ulama it takes place nevertheless; with the exception of the Hanbalis and Zahiris, who regard such a sale as batil. [24. Khallaf, 'Ilm, p. 113.]

Another consequence of this distinction is that **haram li-dhatih is not permissible save in cases of dire necessity** (darurah). In this way, uttering a word of infidelity, or drinking wine, is only permitted when it saves

life. Haram li-ghayrih, on the other hand, is permissible not only in cases of absolute necessity but also when it prevents hardship. Thus a physician is permitted to look at the private parts of a patient even in the case of illnesses which do not constitute an immediate threat to life. [25. Abu Zahrah, Usul, p. 35.]

Another criterion for distinguishing the two varieties of haram that some ulama have mentioned is that **haram li-ghayrih consists of an act which leads to haram li-dhatih**. In this way, looking at the private parts of another person is forbidden because it can lead to zina, which is haram by itself. Similarly, marrying two sisters simultaneously is haram because it leads to the severance of ties of kinship (qat`al-arham), which is haram by itself. [26. Abu Zahrah, Usul, p.34.]

I.4 Makruh (Abominable)

Makruh is a demand of the Lawgiver which requires the mukallaf to avoid something, but not in strictly prohibitory terms. It is the opposite of mandub, so neglecting mandub amounts to makruh. The perpetrator of makruh is not liable to punishment, and according to the majority, he does not incur moral blame either. The Hanafis are in agreement with the majority in respect of makruh tanzihi, but not in regard to makruh tahrimi. The latter, according to the Hanafis, entails moral blame but no punishment.[36] There is an agreement that anyone who avoids makruh merits praise. [27. Khallaf, 'Ilm, p. 114.]

The textual authority for makruh may consist of a reference to something which is **specifically identified as makruh**. There is a Hadeeth, for example, in which the Prophet discouraged any prayers at midday until the decline of the sun, with the exception of Friday. The actual word used in the Hadeeth is that the Prophet disliked [kariha al-nabi) prayers at that particular time. [28. Tabrizi, Mishkat, I, 330, Hadeeth no. 1047.]

An **equivalent term to makruh** occurs, for example, in the Hadeeth which reads: **'The most abominable of permissible things [abghad al-halal] in the sight of God is divorce.'** [29. Tabrizi, Mishkat, II, 978, Hadeeth no. 3280.]

Makruh may also be conveyed in the form of a **prohibition but in language that indicates only reprehensibility**. An example of this is the Qur'anic text which provides, **'Ask not about things which, if made clear to you, would trouble you, but if you ask about them when the Qur'an is being revealed, then they will be explained to you'** (al-Ma'idah, 5:101). An example of this style of communication in the Hadeeth is as follows: **'Leave that of which you are doubtful in favour of that which you do not doubt [. . .]'** [30. Tabrizi, Mishkat, II, 845, Hadeeth no. 2773.]

Makruh is the lowest degree of prohibition (tahrim), and in this sense is used as a convenient category for matters which fall in the gray areas between halal and haram, that is, matters which are definitely discouraged but where the evidence to establish them as haram is less than certain. [31. Qasim, Usul, p. 225.]

The Hanafi description of makruh tanzihi is the same as that which the majority of ulama have given to makruh in general. The majority of ulama have characterised the value of makruh to be that 'committing it is not punishable but omitting it is praiseworthy'.

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[36] [Al-Haj: It entails punishment as much as the omission of wajib, that is not fard, entails punishment, according to the Hanafis.]

Makruh tahrimi, or 'abominable to the degree of prohibition' is, on the other hand, nearer to haram. An act is haram when its prohibition is decreed in definitive terms, otherwise it is makruh tahrimi. An example of makruh tahrimi is the wearing of gold jewellry and silk garments for men, which are forbidden by an Ahad (solitary) Hadeeth. While referring to these two items, the Hadeeth provides: **'These are forbidden [haram] to the men of my community but are lawful [halal] to their women.'** [32. Abu Dawud, Sunan, III, 1133, Hadeeth no 4046.]

The difference between the Hanafis and the majority relates to the nature of the evidence on which the makruh is founded. When a prohibition is conveyed in an imperative demand of the Lawgiver but there is some doubt over its authenticity or meaning, the majority of ulama classify it as haram, whereas the Hanafis classify it as makruh tahrimi. The Hanafi position in regard to the division of makruh into these two types is essentially similar to their approach in regard to drawing a distinction between fard and wajib. [34. Khallaf, 'Ilm, p. 116.]

I.5 Mubah (Permissible)

Mubah (also referred to as halal and ja'iz) is defined as communication from the Lawgiver concerning the conduct of the mukallaf which gives him the option to do or not to do something.

The Lawgiver's communication may be **in the form of a clear nass** such as the Qur'anic text which provides, in a reference to foodstuffs, that **`this day all things good and pure have been made lawful (uhilla) to you [...]'** (al-Ma'idah, 5:6).

Alternatively the text may state that the mukallaf **will not incur a sin, blame or liability**. Concerning the permissibility of betrothal, for example, the Qur'an provides, **`there is no blame on you [la junaha `alaykum] if you make an offer of betrothal to a woman [. . .]'** (al-Baqarah, 2:235).

Similarly, committing a sinful act out of sheer necessity is permissible on the authority of the Qur'an, which provides, **`If someone is compelled by necessity without willful disobedience or transgression, then he is guiltless [fala ithma `alayh]'** (al-Baqarah, 2:173). [35. Ghazali, Mustasfa, I, 42.]

Sometimes a **command may only amount to permissibility** when the nature of the conduct in question or other relevant evidence indicates that. An example of this is the text which orders worshippers to **`scatter in the earth'** once they have completed the Friday prayers (alJumu`ah, 62:10). The nature of this command and type of activity to which it relates suggest that it conveys permissibility only.

If the law provides no ruling to specify the value of a certain conduct, then according to the doctrine of istishab al-asl (presumption of continuity), permissibility (ibahah) remains the original state which is presumed to continue. The authority for this presumption is found in the Qur'anic text which provides, **`has created everything in the earth for your benefit'** (al-Baqarah, 2:29). By implication, it is understood that the benefit in question cannot materialise unless `everything in the earth' is made mubah to utilise in the first place.

Mubah has been divided into three types. [on the harm-benefit scale]

I. The first is mubah which **does not entail any harm** to the individual whether he acts upon it or not, such as eating, hunting or walking in the fresh air.

II. The second type of mubah is that whose commission **does not harm the individual although it is essentially forbidden**. Included in this category are the prohibited acts which the Lawgiver has made permissible on account of necessity, such as eating the flesh of a dead carcass to save one's life.

III. The third is not really mubah per se: things which **were practiced but were then prohibited** with the proviso that those who indulged in them before the prohibition are exonerated. For example, wine-drinking was not prohibited until the Prophets migration to Madinah.

It would be incorrect, as al-Ghazali explains, to apply the term 'mubah' to the acts of a child, an insane person, or an animal, nor would it be correct to call the acts of God mubah. Acts and events which took place prior to the advent of Islam are not to be called mubah either. 'As far as we are concerned, our position regarding them is one of abandonment [tark]', which obviously means that such activities are not to be evaluated at all. Mubah proper, al-Ghazali adds, is established in the express permission of Almighty God which renders the act permissible either in religious terms or in respect of a possible benefit or harm that may accrue from it in this world. [37. Ghazali, Mustasfa, I, 42.]

[Divisions of Hukm Taklifi]

The ulama of usul definitely consider mubah to be a hukm shar'i, although including it under al-hukm al-taklifi is on the basis of mere probability as there is basically no liability [taklif] in mubah as one of the five varieties of defining law.

The Hanafis have only differed with the majority with regard to the sub-divisions of wajib and makruh as already explained. Bearing in mind the two sub-divisions of wajib and makruh that the Hanafis have added to al-hukm altaklifi, the Hanafis thus classify the latter into seven types, whereas the majority divide it into five varieties only.

II. Declaratory Law (al-Hukm al-Wad'i)

'Declaratory law' is defined as communication from the Lawgiver which enacts something into a cause (sabab), a condition (shart) or a hindrance (mani`) to something else.

This may be illustrated by reference to the Qur'anic text regarding the punishment of adultery, which enacts the act of **adultery** itself as the **cause** of its punishment (al-Baqarah, 2:24).

An explicit example of a declaratory law is the Hadeeth which provides that **'there is no nikah without two witnesses'**. [38. Abu Dawud, Sunan, II, 557, Hadeeth no. 2079.] The presence of **two witnesses** is thus rendered a **condition** for a valid marriage.

And lastly, an example of a declaratory law consisting of a **hindrance** is the Hadeeth which provides that **'there shall be no bequest to an heir'**, [39. Abu Dawud, Sunan, II, 808; Hadeeth no. 2864.] which obviously enacts the tie of kinship between the testator and the legatee into a hindrance to bequest.

To execute the defining law is normally within the capacity of the mukallaf. The demands, for example, addressed to the mukallaf concerning prayers and zakah are both within his means. **Declaratory law may, on the other hand, be within or beyond the capacity of the mukallaf**. For instance, the arrival of a particular time of day which is the cause (sabab) of salah is beyond the means and capacity of the worshipper. [41. Khallaf, 'Ilm, p. 102; Abu 'Id, Mabahith, p. 60.]

The function of declaratory law is explanatory in relation to defining law. It is, for example, by means of declaratory law that we know offer and acceptance in a contract of sale to be the cause of the buyer's ownership, that divorce causes the extinction of marital rights and obligations, and that the death of a person is the cause of the right of the heir to his inheritance. Similarly, it is by means of a declaratory law that we know intellectual maturity to be the condition of voluntary disposition of property in gift (hibah) and charitable endowment (waqf). [42. Abdur Rahim, Jurisprudence. pp. 61-62.]

As noted above, declaratory law is divided into five varieties. The first three of these, namely cause, condition and hindrance, have already been discussed to some extent. Two other varieties which are added to these are the **`azimah (strict law) as opposed to rukhsah (concessionary law), and valid (sahih) as opposed to invalid (batil)**.

To include the first three under al-hukm al-wad'i is obvious from the very definition of the latter. But classifying the last two divisions, that is, azimah-rukhsah and sahih-batil, under al-hukm al-wad'i may need a brief explanation. It is well to point out in this connection that almost every concession that the Lawgiver has granted to the individual is based on certain causes which must be present if the concession is to be utilised. The Lawgiver, for example, enacts traveling, illness or removal of hardship into the cause of a concession in regard to, say, fasting or salah.

In classifying sahih and batil as sub-divisions of declaratory law, it will be further noted that a hukm is valid when the conditions of its validity are fulfilled, and is invalid if these conditions are not met. In short, since the last two divisions are basically concerned with causes and conditions, they are included under the class of declaratory law. [44. Qasim, Usul, p. 228; Abu `Id, Mabahith, p. 105.]

II.1 Cause (Sabab)

A sabab is defined as an attribute which is evident and constant [wasf zahir wa-mundabat] and which the Lawgiver has identified as the indicator of a hukm in such a way that its presence necessitates the presence of the hukm and its absence means that the hukm is also absent.

A sabab may be an act which is within the power of the mukallaf, such as murder and theft in their status as the causes of retaliation (qisas) and a hadd penalty respectively. Alternatively, the sabab may be beyond the control of the mukallaf such as minority being the cause of guardianship over the person and property of a minor.

When the sabab is present, whether it is within or beyond the control of the mukallaf, its **effect** (i.e. the musabbab) is **automatically present** even if the mukallaf had not intended it to be. For example, when a man divorces his wife by a revocable talaq, he is entitled to resume marital relations with her even if he openly denies himself that right. Similarly, when a man enters into a contract of marriage, he is obligated to provide dower and maintenance for his wife even if he explicitly stipulates the opposite in their contract. [45. Shawkani, Irshad, p.6; Khallaf, `Ilm; p. 118.]

II.2 Condition (Shart)

A shart is defined as an evident and constant attribute whose **absence necessitates the absence of the hukm** but whose presence does not automatically bring about its object (mashrut). For example, the ablution (wudu') is a necessary condition of salah, but the presence of wudu does not necessitate salah. A condition normally complements the cause and gives it its full effect. Killing is, for example, the cause of retaliation; however, this is on condition that it is deliberate and hostile.

A condition may be **laid down by the Lawgiver, or by the mukallaf**. Whenever the former enacts a condition, it is referred to as shart shar'i, or 'legal condition', but if it is a condition which is stipulated by the mukallaf, it is referred to shart ja'li, or 'improvised condition'. An example of the former is witnesses in a marriage contract, and of the latter, the case when spouses stipulate in their marriage contract the condition that they will reside in a particular locality.

Shart also differs with rukn (pillar, essential requirement) in that the latter partakes in the essence of a thing. Bowing and prostration (ruku' and sajdah), for example, are each an essential requirement (rukn) of salah and partake in the very essence of salah, but ablution is a condition of salah as it is an attribute whose absence disrupts the salah but which does not partake in its essence.[46. Khallaf, `Ilm, p. 118.]

II.3 Hindrance (Mani`)

A mani` is defined as an act or an attribute whose **presence either nullifies the hukm or the cause of the hukm**. For example, difference of religion, and killing, are both obstacles to inheritance.

From the viewpoint of its **effect on the cause (sabab) or on the hukm itself, the mani' is divided** into two types:

First, the **mani` which nullifies the cause**. An example of this is the indebtedness of a person who is liable to the payment of zakah. The fact of his being in debt hinders the cause of zakah, which is ownership of property.

Secondly, there is the **hindrance which affects the hukm**. An example of this is paternity, which hinders retaliation: if a father kills his son, he is not liable to retaliation although he may be punished otherwise. Paternity thus hinders retaliation according to the majority of ulama despite the presence of the cause of retaliation, which is killing, and its condition, which is the intention to kill. Malik held, on the other hand, that the father may be retaliated against for the deliberate killing of his offspring. [47. Khallaf, `Ilm, p. 120.]

II.4 Strict Law (`Azimah) and Concessionary Law (Rukhsah)

A law, or hukm, is an 'azimah when it is in its primary and unabated rigour without reference to any attenuating circumstances which may soften its original force or suspend it. It is, in other words, a law as the Lawgiver intended it in the first place. For example, salah, zakah, the hajj, jihad, etc. are classified under 'azimah.

A law, or hukm, is a rukhsah, by contrast, when it is considered in conjunction with attenuating circumstances. Rukhsah embodies the exceptions, if any, granted to bring facility in difficult circumstances. (The concession to travelers to break the fast during Ramadan.) The concessionary law in this case is valid only for the duration of traveling.

Strict law may consist of either commands or prohibitions. Thus the prohibition of murder, theft, adultery, etc., are 'azimah. [48. Aghnides, Muhammedan Theories, p. 85ff.]

Rukhsah can only exist when there is `azimah in the first place. God Almighty has not made fasting in Shawwal obligatory. This is not a concession, as there exists no obligations in the first place. It would also be incorrect to call the permissibility of tayammum in the absence of water a rukhsah. But it is so if it is a substitute for wudu' when the weather is extremely cold. [49. Ghazali, Mustasfa, I, 62-63.]

Rukhsah occurs to any of four varieties.

Firstly, in the form of **permitting a prohibited act** on grounds of necessity, such as eating the flesh of a carcass, and drinking wine at the point of starvation or extreme thirst.

Secondly, rukhsah may occur in the form of **omitting a wajib** when conformity to that wajib causes hardship, such as the concession granted to the traveler to shorten the quadruple salah.

Thirdly, in the area of transactions, rukhsah occurs in the form of **validating contracts** which would normally be disallowed. For example, lease and hire (ijarah), advance sale (salam) and order for the manufacture of goods (istisna`) are all anomalous, as the object of contract therein is non-existent at the time of contract, but they have been exceptionally permitted in order to accommodate the public need.

Lastly, concessions to the ummah from rigorous laws in previous revelations. For ex., zakah to the extent of one-quarter of one's property and impermissibility of salah outside a mosque. [50. Abu Zahrah, Usul, p. 50.]

II.5 Valid, Irregular and Void (Sahih, Fasid, Batil)

These are Shari'ah values which describe and evaluate legal acts incurred by the mukallaf. To evaluate an act according to these criteria depends on whether or not the act fulfils the essential requirements (arkan) and conditions (shurut), as well as to ensure that there exist no obstacles to hinder its proper conclusion. For example, salah is a shar'i act and is evaluated as valid when it fulfils all the essential requirements and conditions. Similarly, a

contract is valid when it fulfils all of its necessary requirements, and where there is nothing to hinder its conclusion; otherwise it is void.

When salah is performed according to its requirements, it fulfils the wajib, otherwise, the wajib remains unfulfilled. A valid contract gives rise to all of its legal consequences.

The ulama are in **agreement** to the effect that acts of devotion **(`ibadat) can either be valid or void**, in the sense that there is no intermediate category.

The majority maintained a similar view with regard to transactions. Only a valid contract of sale, for example, can give rise to its legal consequences, namely, to transfer ownership of the object of sale to the buyer and. The majority maintains that invalidity is a monolithic concept in that there are no shades and degrees of invalidity. According to this view, fasid and batil are two words with the same meaning, whether in reference to devotional matters or to civil transactions.

The Hanafis have, however, distinguished an **intermediate category** between the valid and void, namely the **fasid**. When the deficiency in a contract affects an essential requirement (rukn), the contract is null and void and fulfils no legal propose. If, however, the deficiency in a contract **only affects a condition**, the contract is fasid but not void. **A fasid contract**, although deficient in some respects, is still a contract and **produces some of its legal consequences**, but not all. Thus a fasid contract of sale establishes the purchaser's ownership over the object of sale when he has taken possession thereof, but does not entitle the purchaser to the usufruct (intifa'). Similarly, in the case of an irregular contract of marriage, such as one without witnesses, the spouses or the qadi must either remove the deficiency or dissolve the marriage, even if the marriage has been consummated. If the deficiency is known before consummation, the consummation is unlawful. But the wife is still entitled to the dower (mahr) and must observe the waiting period upon dissolution of marriage. The offspring of a fasid marriage is legitimate, but the wife is not entitled to maintenance, and there is no right of inheritance between the spouses. **The Hanafi approach** to the fasid is also grounded in the idea that the **deficiency** which affects the attribute but not the essence of a transaction **can often be rectified**. If, for example, a contract of sale is concluded without assigning a specified price, it is possible to specify the price (thaman) after the conclusion. [51. Abu Zahrah, Usul, pp. 51-52.]

III. The Pillars (Arkan) of Hukm Shar'i

The hukm shar'i, that is, the law or value of Shari'ah, consists of three essential components. First of all, the hukm must have been authorised by the **hakim**, that is, the Lawgiver; it must also have a subject matter which is referred to as **mahkum fih**, and then an audience, namely the **mahkum `alayh**, who must be capable of understanding or at least of receiving the hukm.

III.1 The Lawgiver (Hakim)

The ulama are unanimous to the effect that the source of all law in Islam is God Most High, whose will and command is known to the mukallaf either directly through divine revelation, or indirectly by means of inference, deduction and ijtihad. The Qur'an repeatedly tells us that **'The prerogative of command belongs to God**

alone' (Al-Imran, 6:57). Law and justice in the Muslim community must derive their validity and substance from the principles and values that the Lawgiver has sanctioned. This is the purport of the Qur'anic text in sura al-Ma'idah (5:45 and 5:49) which declares that the unbelievers are those who refuse to accept the authority of the divine law. **Even the Prophet does not partake in the prerogative of command**, as his command, or that of the ruler, the imam, the master or the father for that matter, does not constitute binding authority in its own right; instead, obedience to such individuals is founded in the command of the Lawgiver. **Neither is human intellect**, or 'aql, alone, a source of law in its own right. [52. Ghazali, Mustasfa, I, 53.]

The ulama are in **disagreement**, however, as to **the way in which** the will or the **hukm** of the Lawgiver regarding the conduct of the mukallaf is to be known and **identified**. Can we know it by means of our intellectual faculty without the aid and mediation of messengers and scriptures? A similar question arises concerning harmony and concordance between reason and revelation, in that when the human intellect determines that something is good (hasan) or evil (qabih), is it imperative that the hukm of the Lawgiver should be identical with the dictates of reason? In response to these questions, the ulama have advanced three different views, which are as follows:

Firstly, the Ash'arites, namely the followers of Abu'l-Hasan al-Ash'ari (d. 324 A.H.), maintain that it is not possible for human intellect to determine what is good and evil, or identify the hukm of the Lawgiver, without the aid of divine guidance. For human reasoning is liable to err. For example, honesty is good, but when it is likely to cause the death of an innocent person in the hands of a tyrant, it may be regarded as evil. The Ash'arites thus maintain that right and wrong are not determined by reference to the nature of things, or our perception thereof, but are determined as such by God. Hence the criterion of right and wrong is shar', not 'aql. This view is in accord with what is known as the principle of the rule of law (principle of legality) that a man is not required to do something or avoid it unless the law has been communicated to him in advance. Thus when a person has never received the message of the Lawgiver, he is not a mukallaf and deserves neither reward nor punishment. This view quotes in support the Qur'anic proclamation: **`And We never punish until We send a messenger'** (al-Isra, 17:15). The Ash'arites maintain the view that the commands of the Lawgiver relate to the conduct of the mukallaf only after the advent of Islam and that prior to this event there is no basis for obligation. Infidelity (kufr) is not haram, nor is faith (lyman) wajib before the revelation. [53. Shawkani, Irshad, p.7.]

Secondly, the Mu'tazilah, that is, the followers of Ibrahim al-Nazzam, held the view that human intellect can identify the law of God regarding the conduct of the mukallaf even without the mediation of scriptures and messengers. The shar' only removes the curtain from what the `aql could itself perceive. The intellect (`aql) can identify the good and evil in human conduct by reference to its benefit and harm. God's law is not only identifiable by human intellect but identical with its dictates. A person who acts against the requirement of reason may therefore be punished and one who acts in harmony with it may be rewarded. In this way, a person who has received no communication from the Lawgiver can still be considered a mukallaf and be held responsible on the basis of reason. [54. Ghazali, Mustasfa, I, 36.] Al-Ghazali is critical of the Mu'tazili view for its propensity to turn the determination of good and evil into a totally relative proposition. When an act is agreeable to one person and

disagreeable to another, it is good from the viewpoint of the former and evil from that of the latter. The Shari'ah does not and cannot perate on this basis. Instead, the Shari'ah evaluates the acts on an objective plane. [55. hazali, Mustasfa, I, 136.] Al-Shawkani is also critical of the Mu'tazili view, and highlights some of its weaknesses by saying that certain areas of human conduct are not amenable to rational evaluation. It is true that 'aql can determine the value, say, of truth and falsehood, yet it cannot determine the virtue of fasting on the last day of Ramadan or the enormity of fasting on the day which follows it. [56. Shawkani, Irshad, p. 7.] `ibadat, including salah and the pilgrimage of hajj, fall under this category. The Mu'tazili approach to the question of right and wrong embodies a utilitarian approach to jurisprudence in the sense that a good law is that which brings the greatest benefit to the largest number.

Thirdly, the Maturidis, namely the followers of Abu Mansur al-Maturidi (d.333 A.H.) suggested a middle course, which is adopted by the Hanafis and considered most acceptable. According to this view, right and wrong can be ascertained and evaluated by human intellect. But this does not necessarily mean the law of God is always identical with the dictates of 'aql, for human intellect is liable to error. The responsibility of the mukallaf is to be determined not with reference to the dictates of human reason but on the basis of the law as the Lawgiver has ommunicated it. `Aql is capable of discerning good and evil, but this evaluation does not constitute the basis of reward and punishment; which is a matter solely determined by the Lawgiver. [58. Abu Zahrah Usul, p. 56.]

III.2 The Subject-Matter of Hukm (al-Mahkum Fih)

Mahkum fih denotes the acts, rights and obligations of the mukallaf which constitute the subject-matter of a command, prohibition or permissibility.

When the ruling of the Lawgiver occurs in the forms of either wajib or mandub, in either case the individual is required to act in some way. Similarly, when the hukm of the Lawgiver consists of a prohibition (tahrim) or abomination (karahah), it is once again concerned with the conduct of the mukallaf. In sum, all commands and prohibitions are concerned with the acts and conduct of the mukallaf.

When the demand of the Lawgiver occurs in the form of a defining law (al-hukm al-taklifi) such as fasting, jihad, and the payment of zakah, etc., the subject-matter of the hukm is the act of the mukallaf. Similarly, when the demand of the Lawgiver occurs in the form of declaratory law (al-hukm al-wad`i), such as ablution (wudu') being a condition of salah, the subject-matter of hukm consists of the act of the mukallaf. Occasionally, the mahkum fih does not consist of the conduct of the individual, but even then it is related to it. For ex., the arrival of Ramadan which is the cause (sabab) of fasting is not an act of the individual, but is related to the latter in the sense that the effect (musabbab) of that cause, namely fasting, is an act of the mukallaf. [59. Khallaf, `Ilm, p. 128.]

In order to constitute the subject matter of a hukm, the conduct which the individual is required to do, or avoid, must fulfill the following three conditions.

Firstly, the individual **must know the nature of the conduct** so that he can perform what is required of him or refrain from that which is forbidden. [60. Knowledge in this context means understanding the nature of a command or a prohibition by the individual to the extent that he can act upon it. It does not mean affirmation of the mind (tasdiq). For if this were to be a requirement, the unbelievers would have been excluded from the

meaning of mukallaf, which they are not. See Shawkani, Irshad, p. 11.] The ambivalent (mujmal) text of the Qur'an concerning salah, zakah and hajj, for example, did not obligate anyone until these matters were explained and clarified by the Prophet. Furthermore, the ulama are in agreement to the effect that the necessary instruction or explanations must not be delayed and must be given in time when they are needed, otherwise they would fail to provide the basis of obligation (taklif).When we say that the individual must know the nature of the act he is required to do, it means that it should be possible for him to obtain such knowledge. Hence when a person is in full possession of his capacities and it is possible for him to learn the law, he is presumed to know his legal obligations. The law is therefore applied to him, and his ignorance of the rules of Shari'ah is no excuse.

Secondly, the act which the individual is required to do must be **within his capability**, or, in the case of a prohibition, be within his capability to avoid. The principle here is dearly stated in the Qur'an, which declares that **`God does not obligate a living soul beyond the limits of his capacity'** (al-Baqarah, 2:256) and that **`God puts no burden on any person beyond what He has given him'** (al-Talaq, 65:7). An act may be **conceptually unfeasible**, such as asking a person to be awake and asleep at the same time, or asking him to do and not to do something simultaneously. Likewise, an act may be **physically impossible**, such as ordering a person to fly without the necessary means. [61. Shawkani, Irshad, p. 11.] A corollary of this rule is that no person may be obligated to act on behalf of another person or to stop another competent individual from acting. For this would be tantamount to asking a person to do the impossible. No-one may be obligated to do or not to do something in regard to which he has no choice, such as asking someone to act against his natural and biological functions. Thus when we read in the Hadeeth a command asking the Muslims to **`avoid anger [la taghdab]'**, although the manifest (zahir) terms of this Hadeeth demand avoidance of a natural phenomenon, what it really means is that the adverse consequences of uncontrolled anger which might lead to taking the law into one's own hands must be avoided. **There is, of course, some hardship involved in all obligations**. The kind of hardship that people can tolerate without prejudice or injury is not the aim. It is intolerable hardship which the Shari'ah does not impose. **A hukm shar`i may sometimes impose unusual hardship** on the individual, such as the fulfillment of certain collective obligations like jihad (holy struggle) and hisbah, that is, promotion of good and prevention of evil, under adverse conditions. Jihad which requires the sacrifice of one's life is undoubtedly onerous in the extreme. But it is deemed necessary and warranted in view of the values that are upheld and defended thereby. [64. Cf. Abu `Id, Mabahith, p.139.]

And lastly, the demand to act or not to act must **originate in an authoritative source** which can command the obedience of the mukallaf. This would mean that the hukm must emanate from God or His messenger. It is mainly due to this requirement that the proof or evidence in which the law is founded must be identified and explained. Consequently, we find that in their juristic expositions, the fuqaha normally explain the evidential basis (hujjiyyah) of the rules of Shari'ah that they expound, especially rules which are aimed at regulating the conduct of the mukallaf. [65. Abu Zahrah, Usul, p.256ff.]

[Right of God (haqq Allah) or a Right of Man (haqq al`abd)]

The acts of the mukallaf may consist of either a Right of God (haqq Allah) or a Right of Man (haqq al`abd), or of a combination of both. The Right of God is called so not because it is of any benefit to God, but because it is beneficial to the community at large and not merely to a particular individual. It is, in other words, a public right and differs from the Right of Man, or private right, in that its enforcement is a duty of the state. The enforcement of a private right, on the other hand, is up to the person whose right has been infringed, who may or may not wish to demand its enforcement. [66. Khallaf, `Ilm, p. 128.]

The ulama further classified these rights under four main categories:

Firstly, acts which exclusively consist of the Right of God, such as acts of devotion and worship, including salah and jihad, which are the pillars of religion and are necessary for the establishment of an Islamic order. These, which are often referred to as huquq Allah al-khalisah, or pure Rights of God', occur in eight varieties:

a) Rights of God which, consist exclusively of worship, such, as professing the faith (iman), salah, zakah, the pilgrimage and jihad.

b) Rights which consist of both worship and financial liability (ma'unah), such as charity given on the occasion of 'id al-fitr, marking the end of Ramadan.

c) Rights in which financial liability is greater than worship, like the tithe that is levied on agricultural crops.

d) Rights of God which consist of financial liability but have a propensity toward punishment, such as the imposition of kharaj tax on land in the conquered territories.

e) Rights which consist of punishment only, like the hudud, that is, the prescribed penalties for theft and adultery, and so forth.

f) Rights which consist of minor punishment (`uqubah qasirah), such as excluding the murderer from the inheritance of his victim. This is called `uqubah qasirah on account of the fact that it inflicts only a financial loss.

g) `Punishments which lean toward worship', such as the penances (kaffarat).

h) Exclusive rights, in the sense that they consist of rights alone and are not necessarily addressed to the mukallaf, such as the community right to mineral wealth or to the spoils of war (ghana'im). [67. Abu Sinnah, Nazariyyah al-Haqq', p.179; Abu 'Id, Mabahith, p. 141ff.]

Secondly, acts which exclusively consist of the rights of men, such as the right to enforce a contract, or the right to compensation for loss, the purchaser's right to own the object he has purchased, the vendor's right to own the price paid to him, the right of pre-emption (shuf), and so on. To enforce such rights is entirely at the option of the individual concerned.

Thirdly, acts in which the rights of the community and those of individuals, are combined, while of the two the former preponderate. The right to punish a slanderer (qadhif) belongs, according to the Hanafis, to this class, by reason of the attack made on the honour of one of its members. Since the Right of God is dominant in qadhf, the victim of this offence (i.e. the maqdhuf) cannot exonerate the offender from punishment. The Shafi`is have, however, held the contrary view by saying that qadhf is an exclusive Right of Man and that the person so defamed is entitled to exonerate the defamer. All acts which aim at protecting human life, intellect and property, fall under this category. To implement consultation (shura) in public affairs is one example, or the right

of the individual in respect of bay'ah in electing the head of state. According to the Maliki jurist al-Qarafi, all rights in Islam partake in the Right of God in the exclusive sense that there is no right whatsoever without the haqq Allah constituting a part thereof. Thus when a person buys a house, he exercises his private right insofar as it benefits him, but the transaction partakes in the Right of God insofar as the buyer is liable to pay the purchase price. The basic criterion of distinction between the Right of God and the Right of Man is whether it can be exempted by the individual or not. Thus the vendor is able to exonerate the purchaser from paying the price, and a wife is able to exonerate her husband from paying her a dower (mahr), but the individual cannot exonerate anyone from obligatory prayers, or from the payment of zakah. [68. Abu Sinnah, Nazariyyah al-Haqq', p. 181.]

Fourthly, there are matters in which public and private rights are combined but where the latter preponderate. Retaliation (qisas), and blood-money (diyah) of any kind, whether for life or for grievous injury, fall under this category. The community is entitled to punish such violations, but the right of the heirs in retaliation and in diyah for erroneous killing, and the right of the victim in respect of diyah for injuries, is preponderant. The guardian (wali) of the deceased, in the case of qisas, is entitled to pardon the offender or accept a compensation. But the state, which represents the community, is still entitled to punish the offender through a ta'zir punishment even. [69. Abu Zahrah, Usul, p. 257.]

III.3 Legal Capacity (Ahliyyah)

Being the last of the three pillars (arkan) of hukm shar`i this section is exclusively concerned with the legal capacity of the mahkum `alayh, that is, the person to whom the hukm is addressed, and it looks into the question of whether he is capable of understanding the demand that is addressed to him and whether he comprehends the grounds of his responsibility (taklif). Since the possession of the mental faculty of `aql is the basic criterion of taklif, the law concerns itself with the circumstances that affect the sanity and capacity of the individual, such as minority, insanity, duress, intoxication, interdiction (hajr) and mistake.

Legal capacity is primarily divided into two types: capacity to receive or inhere rights and obligations, referred to as ahliyyah al-wujub, and capacity for the active exercise of rights and obligations, which is referred to as ahliyyah al-ada'. The former may be described as `receptive legal capacity', and the latter as 'active legal capacity'. [70. Cf. Abdur Rahim, Jurisprudence, p. 217.]

Every person is endowed with legal capacity of one kind or another. Receptive legal capacity is the ability of the individual to receive rights and obligations on a limited scale, whereas active legal capacity enables him to fulfill rights and discharge obligations, to effect valid acts and transactions, and bear full responsibility toward God and his fellow human beings.

The criterion of the existence of receptive legal capacity is life itself, whereas the criterion of active legal capacity is maturity of intellect. Receptive legal capacity is vested in every human being, competent or otherwise. An insane person, a foetus in the womb, a minor and a foolish person (safih), whether in good health or in illness: all possess legal capacity by virtue of their dignity as human beings. [71. Khallaf, 'Ilm, p. 136.]

Active legal capacity is only acquired upon attaining a certain level of intellectual maturity and competence. Only a person who understands his acts and his words is competent to conclude a contract, discharge

an obligation, or be punished for violating the law. Since intelligence and discernment are hidden qualities which are not readily apparent to the senses, the law has linked personal responsibility with the attainment of the age of majority (bulugh). However, it is the intellectual faculty of the individual rather than age as such which determines his legal capacity. This is why an adult who is insane, or an adult of any age who is asleep, is not held responsible for his conduct. The Hadeeth provides: **`The pen is lifted from three persons: the one who is asleep until he wakes, the child until he attains puberty, and the insane person until he regains sanity**. [72. Tabrizi, Mishkat, II, 980, Hadeeth no. 3287.]

Receptive legal capacity may either be 'deficient' or 'complete'. The receptive legal capacity of a child in the womb is incomplete in the sense that it can only receive certain rights, such as inheritance and bequest, but cannot bear any obligation toward others. Receptive legal capacity is complete when a person can both have rights and bear obligations. This type of legal capacity is acquired by every human being as of the moment of birth. During its infancy and later stages of childhood, a child is capable of discharging, albeit through his guardian, certain obligations in respect, for example, of maintenance, liability for loss (daman), and payment for services rendered to him.

As for the active legal capacity, three possible situations are envisaged.

First, a person may be totally lacking of active legal capacity, as in the case of a child during infancy or an insane person. No legal consequences accrue from their acts. They can only be held liable with reference to their property, but not to their persons. They cannot be subjected, for example, to retaliation.

Second, a person may be partially lacking in active legal capacity. Thus a discerning child (al-sabi almumayyiz), that is, a child between seven and fifteen years of age, or an idiot (ma'tuh) who is neither insane nor totally lacking in intellect but whose intellect is weak, possess a legal capacity which is deficient. [73. Cf. Abdur Rahim, Jurisprudence, p. 240.] The discerning child and the idiot are capable only of concluding acts and transactions that are totally to their benefit, such as accepting a gift or charity. But if the transaction in question is totally disadvantageous to them, such as giving a gift or making a will, or pronouncing a divorce, these are not valid at all even it their guardians approve of them. As for transactions which partake in both benefit and loss, they are valid only with the permission of the guardian (wali).

Thirdly, active legal capacity is complete upon the attainment of intellectual maturity unless there is evidence to show that he or she is deficient of intellect. Persons who are fully competent may sometimes be put under **interdiction** (hajr) with a view to protecting the rights of others. A person may be interdicted by means of a judicial order which might restrict his powers to conclude certain transactions. A **debtor** may thus be interdicted so that the rights of his creditors may be protected. **A person in his death-illness** (marad al-mawt) is also deficient of legal capacity, as severe illness affects the physical and mental faculties. This is partly why Imam Abu Hanifah differed with the majority by holding the view that foolishness (safahah), indebtedness and carelessness (ghaflah), do not affect the active legal capacity. He refuses to accept these as grounds of interdiction, as the benefit of interdiction in these cases is far outweighed by its possible harm. [74. Khallaf, `Ilm, p.140.]

Chapter Eighteen: Conflict of Evidences

[Definition and Scope]

Conflict (ta`arud) occurs when each of two evidences of equal strength requires the opposite of the other.

A conflict is not expected between two evidences of unequal strength, as the stronger would prevail. Thus a genuine conflict cannot arise between a definitive (qat'i) and a speculative (zanni) evidence,[37] nor could there be a conflict between the nass and ijma', nor between ijma` and qiyas, as some of these are stronger than others. A conflict may, however, be encountered between two texts of the Qur'an, two rulings of Hadeeth, or a Qur'anic ayah and a Mutawatir Hadeeth, or two non-Mutawatir Hadeeth, or two rulings of qiyas.

When there is a conflict between two ayat, or one Hadeeth and a pair of aHadeeth, or one qiyas and a pair of analogies, it is a case of conflict between equals, because **strength does not consist in number**.

The strength of two conflicting evidences is determined by reference to the evidence itself or the extraneous/additional factors which might tip the balance in favour of one. For example, of the two conflicting solitary or Ahad Hadeeth, the one narrated by a faqih is considered stronger. [1. Badran, Usul, p. 461.]

Conflict can only arise between two evidences which cannot be reconciled, in the sense that the subject-matter of one cannot be distinguished from the other, nor can they be so distinguished in respect of the time of their application. There are, for example, three different rulings in the Qur'an on wine-drinking, but since they were revealed one after the other, there is no case of conflict. Similarly, if each of two apparently conflicting rules can be applied to the same issue under different circumstances, then there will be no conflict.[38]

A genuine conflict can arise between two speculative (zanni) evidences, not definitive (qat`i) proofs. All conflict between definitive rulings of the Qur'an and Sunnah are apparent, not genuine. Only in cases of evident abrogation (naskh) could it be said that a genuine conflict existed. [2. Ghazali, Mustasfa, II. 126.]

When there is apparent conflict, one must try to discover the objective of the Lawgiver and remove the conflict in the light of that. The mujtahid must therefore try to reconcile them as far as possible, but if he cannot, then he must attempt to prefer one over the other. If the attempt at preference fails, then recourse to abrogation

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[37] [Al-Haj: if you have an apparent conflict between a verse and an ahaad hadeeth, you will still attempt to reconcile between them, because reconciliation is done before giving preference to one whose transmission is more certain. One fiqhi rule that would be operative here is:

"الإِعْمَال أوْلَى مِنَ الإهْمَالِ."

"Consideration is given preference over negligence." It means here consideration of all evidences. Once a report is acceptable, which means Hassan or stronger, you shouldn't simply neglect it for an apparent conflict with another report, because the conflict is most likely with your understanding of the other report. If a mujtahid fails to find any possible way to reconcile, then he gives preference to the more authentic report, as will be discussed here below.]

[38] [Al-Haj: ultimately, there will be no conflict, but as in most apparent conflicts, in the beginning of the mujtahid's enquiry to reconcile, there would seem to be a conflict. Also, the fact that different scholars will have different ways of reconciliation does affirm the presence of an apparent conflict, which resulted in their disagreement.]

should be considered as the last resort. When abrogation also fails, action must be suspended altogether and both conflicting texts are abandoned. [3. Khallaf, `Ilm; p. 229.]

A conflict between the nusus and ijma', or two rulings of the latter, is inconceivable for the obvious reason that no ijma' can be concluded which is contrary to the Qur'an and Sunnah in the first place.

Among the many instances of abrogation the ulama identified in the Qur'an, we may refer to only two; but in both cases a **closer analysis will show that the conflict at issue is not genuine**.

1- The duration of the waiting period ('iddah) of widows. According to one of the two ayat on this subject (al-Baqarah, 2:234), the widow must observe a `iddah of four months and ten days following the death of her husband. This is a general provision which applies to every widow regardless as to whether she is pregnant at the time her husband dies or not. But ayah (al-Talaq, 65:4) conveys a general ruling to the effect that the `iddah of pregnant women continues until the delivery of the child. This also applies to a pregnant widow. The texts thus appear to conflicting regarding the pregnant widow. They, however, could be reconciled if widows were to observe whichever of the two periods were longer. Thus the apparent conflict between the ayat under discussion is removed by recourse to specification (takhsis): the second ayah in this case specifies the general ruling of the first insofar as it concerns pregnant widows.[39] [4. Abu Zahrah, Usul, p.245.]
2- The validity of making a bequest to one's relatives is explicitly permitted in sura al-Baqarah (2:180) which provides: **`It is prescribed when death approaches any of you**, **if he leaves any assets**, **that he makes a bequest to his parents and relatives**.**'** This ruling is deemed to have been abrogated by another text (al-Nisa', 4:11) which prescribes for each of the close relatives a share in inheritance determined, not by the will of the testator, but by the will of God. The two texts thus appear to be in conflict; however the conflict is not genuine as they can be reconciled, and both can be implemented under different circumstances. The first of the two rulings may, for example, be reserved for a situation where the parent, of the testator are barred from inheritance by a disability such as difference of religion.

[Reconciliation]

To reconcile two evidences both of which are general ('Amm), one may distinguish the **scope of their application** from one another by recourse to allegorical interpretation (ta'wil). Supposing there were two conflicting orders, one providing `salah is obligatory on my ummah' and the other `salah is not obligatory on my ummah.' To reconcile, one may assume the first to have contemplated the adult and competent and the second the minors and lunatics. If this is not possible, the two rulings may be distinguished in regard to their respective application or different circumstances. It is possible that one or both of the two are in the nature of a manifest (Zahir) provision and may thus be open to ta'wil, so it may be given an interpretation other than its obvious meaning to avoid a clash. This may be illustrated by the two apparently conflicting Hadeeths on the subject of

[39] [Al-Haj: that specification is true if you accept the position of the majority, first stated by Ibn Mas'ood (Allah be pleased with him), that she will observe the 'iddah of the pregnant woman, which ends for her only (and always) when she gives birth. The other view demanding her to wait for the longer of the two periods is that of 'Ali (blessings and peace be upon him), later adopted by the Hanafis.]

testimony. In the first, the Prophet said: **`Should I inform you who makes the best of witnesses?' To this, the audience responded, `Yes O Messenger of God', and the Prophet said, `It is one who gives testimony before he is requested to do so.'** [5. Muslim, Sahih, p. 281, Hadeeth no. 1059.] However, according to another Hadeeth, he said, **'The best generation is the one in which I live, then the generation after that and then the next one, but after that there will be people who will give testimony although they are not invited to give it.'** [6. Tabrizi, Mishkat, III, 1695, Hadeeth no. 6001.] The best form of testimony under the first is unsolicited testimony, whereas this is frowned upon in the second. Since neither specified a particular context, it is suggested by ta'wil that the first contemplates the Rights of God (huquq Allah) whereas the second contemplates the Rights of Men (huquq al-'ibad). [7. Badran, Usul, pp. 466.]

Allegorical interpretations may offer a solution even in cases where two conflicting orders are specific (Khass). Recourse to ta'wil in this case would once again serve the purpose of distinguishing the scope of each of the two orders. For example, if Ahmad issues two orders to his employee, one of which tells the latter to 'pay 1000 dinars to Zayd' and the other tells him `do not pay 1000 dinars to Zayd', then if circumstances would so permit, the first may be assumed to have contemplated normal relations between Zayd and Ahmad while the second envisaged a hostile situation. [8. Cf. Khudari, Usul, p. 361.]

In the event where one of the conflicting rulings is general ('Amm) and the other specific (Khass), they can be reconciled by excepting the latter from the scope of the former through takhsis al-`Amm, that is, `specifying a part of the general'. Similarly, a text may be absolute in its wording and appear to be in conflict with another text. They could be reconciled if one of them is so interpreted as to **qualify the absolute** terms of the other. (Examples: in the chapter of the rules of interpretation.)

[Favoring One Evidence]

Should the attempt at reconciliation fail, the next step in resolving a conflict, as stated above, is to give preference to one over the other. Inequality in strength may be in content (matn) or in proof of authenticity (riwayah).

Preference on the basis of content would require that the literal is preferred to the metaphorical, the clear (Sarih) to the implicit (Kinayah), the explicit meaning (`ibarah al-nass) to the allusive meaning (isharah al-nass), and the latter is preferred to the inferred meaning of the text (dalalah al-nass). Similarly, words which convey greater clarity are to be preferred. Thus he Muhkam (perspicuous) will be preferred to the Mufassar (unequivocal), the latter to the Nass (explicit) and the Nass to the Zahir (manifest). Among unclear words, the Khafi (obscure) takes priority over the Mushkil (difficult), the latter over the ujmal (ambivalent) and the Mujmal over the Mutashabih (intricate), in an order which has been stated under the rules of interpretation.

Inequality in respect of transmission is mainly concerned with the Hadeeth: when, for example, the Mutawatir is compared to the Mashhur, the former is preferred. Similarly the Mashhur takes priority over the solitary (Ahad), and the report of a transmitter who is faqih is preferred. Reports by persons who are known to be retentive of memory take priority over those whose retentiveness is uncertain. On a similar note, aHadeeth that

are transmitted by leading Companions are given preference. The Hanafis also consider the action of the transmitter upon his own narration to be a supportive factor. The Malikis prefer a Hadeeth that is in agreement with the practice of the people of Madinah. Similarly, the report of a transmitter who is directly involved in an incident is preferable. Thus with the Hadeeth which is reported by the Prophet's wife Maymunah, to the effect that the Prophet married her while both were halal, that is outside the sacred state of ihram for hajj; this report is preferred to that of Ibn `Abbas to the effect that the Prophet married Maymunah while he was in the sacred state of ihram. [9. Abu Dawud, Sunan, II, 486-87, Hadeeth, no. 1839 and 1840; Ghazali, Mustasfa, II, 128.] The ulama are in agreement a Hadeeth reported by all six imams, namely al-Bukhari, Muslim, Abu Dawud, al-Nasa'i, al-Tirmidhi, and Ibn Majah, takes priority. Among aHadeeth which are not reported by all the six, those reported by the first two are preferred, and if one is reported by al-Bukhari and the other by Muslim, the former is preferred. [10. Abu Zahrah, Usul, p. 246.]

Affirmative evidence takes priority over the negative. This may be illustrated by the two rulings of Hadeeth concerning the right of a slave-woman to a divorce upon her release from slavery. It is reported that Barirah was owned by `A'ishah and was married to another slave, Mughith. `A'ishah set her free, and she wanted to be separated from Mughith, who was still a slave. The case was brought to the Prophet, who gave Barirah the choice to remain married to Mughith or be separated. But a second report informs us that Barirah's husband was a free man when she was emancipated. But since it is known for certain that Mugith was originally a slave, the report which negates this original state is therefore ignored in view of the general rule that the affirmative, that is, the evidence which affirms continuation of the original state, takes priority over that which negates it. The jurists consequently held that when a slave-woman is set free while married to a slave only, she will have the choice of repudiating the marriage. Abu Hanifah, however, maintains that she will have the option even when her husband is a free man.[40] [11. Abu Dawud, Sunan, II, 601-602, Hadeeth nos. 2223-7 and footnote no. 1548; Badran, Usul, p. 465.]

The prohibition takes priority over permissibility. Thus if there are two conflicting rules on the same issue, one prohibitory and the other permissive, the former will take priority. However, the mujtahid may depart from this rule and instead apply that which brings ease. [12. Khallaf, `Ilm, p. 232.]

If the attempt at reconciling or preferring, both failed, recourse may be had to abrogation. This would necessitate an enquiry into the chronological order between the two texts. **If this also proves unfeasible**, then action must be suspended on both and the mujtahid may **resort to inferior evidences** in order to determine the ruling. Thus if the conflict happens to be between two rulings of the Qur'an, he may depart from both and determine the matter with reference to the Sunnah. Should there be a conflict between two rulings of the Sunnah, the mujtahid may refer to the fatwa of Companions, and failing that, the issue may be determined on grounds of

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[40] [Al-Haj: a better example would have been the two reports from 'Aishah and Hudhaifah regarding the Prophet urinating while standing. According to 'Aishah, he (blessings and peace be upon him) never did, and according to Hudhaifah, he did. The latter is accepted because it is affirmative, and while the one negating may have not seen that incident, the one affirming it, must have seen it, because a credible narrator is deemed above lying.]

qiyas. **If the mujtahid fails to find a ruling in any of the lower categories of proofs**, then he may resort to the general norms of Shari'ah. These may be illustrated in the following example:

A conflict is encountered between the two rulings of Qur'an concerning the recitation of portions of the Qur'an in congregational prayers. The question which needs to be answered is, whether in a congregational salah, the congregation member, that is the muqtadi, is required to recite sura al-Fatihah after the imam, or remain silent. Two conflicting answers can be derived from two ayat: **`And when the Qur'an is being read**, **listen to it attentively and pay heed**, **so that you may receive mercy'** (al-A'raf, 7:204). It would appear that the muqtadi, according to this ayah, should remain silent when the imam recites the Qur'an. However, according to another ayah, everyone is ordered to **`read whatever is easy for you of the Qur'an'** (al-Muzammil, 73:20). Although neither of the texts make a particular reference to salah, they appear in conflict with regard to the position of the muqtadi. It is reported that on one occasion when the Prophet led the salah, he asked the members of the congregation whether they recited the Qur'an with him, and having heard their answers, he instructed them not to recite behind the imam. But there still remains a measure of inconsistency in the aHadeeth that are reported on this point. Abu Hanifah, Malik, Ibn Hanbal, and al-Shafi'i (according to his former view) held that it is not necessary to recite al-Fatihah behind the imam when he recites aloud, but when the imam recites quietly, the worshippers should recite it. The later Hanafi jurists held it is not necessary for the worshipper to recite behind the imam in either case. [13. Abu Dawud, Sunan, II, 211, Hadeeth no. 825; Badran, Usul, pp. 468-69.]

In the event where an issue cannot be determined by reference to the Sunnah, the mujtahid may resort to the fatwa of a Companion, and failing that, to qiyas. There is, for example, an apparent conflict between the two reports concerning the way the Prophet performed salat al-kusuf (solar eclipse.) According to one of the reports, the Prophet offered two rak'ahs, each consisting of two bowings (ruku`) and two prostration, (sajdah). But according to another report, each of the two units contained four bowings and four prostrations. There is yet another report to the effect that each of the two rak'ahs contained three bowings, and three prostrations. [14. Abu Dawud, Sunan, I, 304, Hadeeth nos. 1173-7.] Hence action is suspended on all and the matter is determined by qiyas. Since salat al-kusuf is a variety of salah, the normal rules of salah are applied: one bowing and two prostrations. [15. Badran, Usul, p.469.]

In the event of a conflict occurring between two analogies, if they cannot be reconciled, then one must be given preference. **The qiyas whose effective cause ('illah) is stated** in an explicit text is to be preferred to the one whose 'illah has been derived through inference (istinbat). Similarly, a qiyas whose `illah is founded in an allusive text (isharah al-nass) takes priority over qiyas whose 'illah is merely a proper or reasonable attribute which is derived through inference and ijtihad.[41]

When the 'illah of qiyas is explicitly stated in the nass or the result of qiyas is upheld by ijma', no conflict is expected. **A conflict may arise between two analogies founded on an inferred `illah**, since this type of `illah involves ijtihad. Ex: the case regarding the `illah of compulsory guardianship (wilayah al-ijbar [jabr]) in the

[41] [Al-Haj: that is for the Hanafis only because they put the alluded implication above the inferred.]

marriage of a minor girl. Abu Hanifah considers the 'illah of the guardian's power of ijbar [jabr] in marriage to be the minority of the ward, whereas Shafi'i considers the 'illah to be her virginity. This difference would in turn give rise to analogies whose results diverge from one another. [17. Abu Zahrah, Usul, pp. 247-48.]

If none of the foregoing methods can be applied to determine the ruling of an issue, then the mujtahid may **base his decision on the original norms of the Shari'ah**. An example of this is to determine the ruling of the Shari`ah that might have to be applied to a hermaphrodite whose gender, whether male or female, cannot be determined and neither side could be preferred. A recourse to the original norms in this case means that the issue remains where it was in the first place. Since neither of the two possibilities can be preferred, in some situations, in the distribution of shares in inheritance, for example, the hermaphrodite will be presumed a male, while he will be presumed a female in other situations as considerations of caution and prevention of possible harm to him may suggest. [18. Badran, Usul, pp. 469-70.] In making such decisions, it is essential the mujtahid does not act against the general principles and spirit of Shari'ah.

Chapter Nineteen: Ijtihad, or Personal Reasoning

[Importance of Ijtihaad]

Ijtihad is the most important source of Islamic law next to the Qur'an and Sunnah. The main difference between ijtihad and the revealed sources is that ijtihad is a continuous process. In this sense, ijtihad continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community.

Since ijtihad derives its validity from divine revelation, its propriety is measured by its harmony with the Qur'an and Sunnah. The sources of Islamic law are therefore essentially monolithic, and the commonly accepted division of the roots of jurisprudence into primary and secondary is somewhat formal rather than real. The essential unity of the Shari'ah lies in the degree of harmony that is achieved between revelation and reason. Ijtihad is the principal instrument of maintaining this harmony.

All various sources of Islamic law next to the Qur'an and Sunnah are manifestations of ijtihad. In this way, consensus, analogy, juristic preference, considerations of public interest (maslahah), etc., are all inter related not only under he main heading of ijtihad, but via it to the Qur'an and the Sunnah. [1. Amin Islahi (Islamic Law, p. 109) has thus aptly stated that: 'There are three prominent and fundamental sources of Islamic Law: the Holy Qur'an, the Sunnah of the holy Prophet (p.b.u.h.) and ijtihad.] It is partly due to the formalistic character of these sub-divisions that they are often found to be overlapping. Thus a ruling of ijma' is often based on analogy, maslahah, or istihsan, and so on'. Similarly, qiyas and istihsan are closely related to one another in the sense that one of the two main varieties of istihsan consists of a selection between two analogies on the same issue. The difference between maslahah and istihsan is largely procedural, for they are essentially the same, the one being reflective of the Maliki and the other of the Hanafi approach to ijtihad.

[Definition]

Being a derivation from the root word jahada, **ijtihad literally means striving, or self-exertion** in any activity which entails a measure of hardship. It would thus be in order to use jahada in respect of one who carries a heavy load, but not a trivial weight.

Juridically, it is defined as the total expenditure of effort by a jurist to infer, with a degree of probability, the rules of Shari'ah from their detailed evidence in the sources. [2. Amidi, Ihkam, IV, 162; Shawkani, Irshad, p. 250.] Some defined it as the application by a jurist of all his faculties either in inferring the rules of Shari'ah from their sources, or applying such rules to particular issues. [3. Abu Zahrah, Usul, p.301.]

Ijtihad consists of an inference (istinbat) that amounts to a **probability (zann), excluding the extraction of a ruling from a clear text**. It also **excludes the discovery of a hukm by asking a learned person** without the exercise of one's own judgment. **Zann in this context is distinguished from 'ilm**, which implies positive knowledge. Since the **decisive rules of Shari'ah impart positive knowledge, they are excluded from the scope** of ijtihad. [4. Shawkani, Irshad, p. 250.] Essential to the meaning of ijtihad is also the concept that the

endeavour of the jurist involves a total expenditure of effort in a manner that the jurist feels an inability to exert himself further. If the jurist has failed to discover the evidence he was capable of discovering, his opinion is void. [5. Ghazali, Mustasfa, II, 102.] And lastly, the definition of ijtihad is explicit on the point that **only a jurist** (faqih) may practice ijtihad. This is explained by the requirements of ijtihad. **Thus the definition of ijtihad precludes self-exertion by a layman** in the inference of ahkam. [6. Shawkani, Irshad, p. 250.]

The subject of ijtihad must be a question of Shari'ah; more specifically, ijtihad is concerned with the practical rules of Shari'ah which usually regulate the conduct of those to whom they apply (i.e. the mukallaf). This would preclude from the scope of ijtihad purely intellectual (`aqli) and customary (urfi) issues, or matters that are perceptible to the senses (hissi) and do not involve the inference of a hukm shar'i from the evidence present in the sources. Thus ijtihad may not be exercised in regard to such issues as the createdness of the universe, the existence of a Creator, the sending of prophets, and so forth, because there is only one correct view in regard to these matters, and any one who differs from it is wrong. Similarly, one may not exercise ijtihad on matters such as the obligatory status of the pillars of the faith, or the prohibition of murder, theft, and adultery. For these are evident truths of the Shari'ah. [7. Shawkani, Irshad, p. 252.]

The detailed evidences found in the Qur'an and Sunnah are divided into four types, as follows.

1) Evidence which is decisive both in respect of authenticity and meaning.

2) Evidence which is authentic but speculative in meaning.

3) That which is of doubtful authenticity, but definite in meaning.

4) Evidence which is speculative in respect both of authenticity and meaning.

Ijtihad does not apply to the first of the foregoing categories, such as the clear nusus concerning the prescribed penalties (hudud). But ijtihad can validly operate in regard to any of the remaining three types of evidence, as the following illustrations will show:

1) **Ijtihad concerning evidence which is definite of proof but speculative of meaning**: al-Baqarah (2:228): **'The divorced women must observe three courses (quru') upon themselves.'** There is no doubt concerning the authenticity of this text, as the Qur'an is authentic throughout. However, the precise meaning of the word quru' is open to speculation. Quru' is a homonym meaning both `menstruations' and `the clean periods between menstruations'. [8. Badran, Usul, p. 473.]

2) **Ijtihad in regard to the second variety**. To give an example, the Hadeeth which provides in regard to zakah on camels that **`a goat is to be levied on every five camels.'** [9. Abu Dawud, Sunan (Hasan's trans.), II, 407, Hadeeth no. 1562.] has a clear meaning, which is why the jurists are in agreement that there is no zakah on less than five camels. But since this is a solitary Hadeeth, its authenticity remains speculative. Ijtihad concerning this Hadeeth may take the form of an investigation into the authenticity of its transmission and the reliability of its narrators. [10. Badran, Usul, p. 474.]

3) **Ijtihad concerning evidence that is speculative in both authenticity and meaning**, we may refer to the Hadeeth: **'There is no salah [la salata] without the recitation of sura al-Fatihah.'** [11. Abu Dawud, Sunan, I, 209, Hadeeth no. 819.] Being a solitary Hadeeth, its authenticity is not proven with certainty. Similarly

it is open to different interpretations in the sense that it could mean either that salah without the Fatihah is invalid, or that it merely incomplete.

And finally with regard to such matters on which no evidence can be found in the nusus or ijma`, ijtihad may take the form of analogical deduction, juristic preference (istihsan), or the consideration of public interest (maslahah), and so on.

The Value (Hukm) of Ijtihad

The ulama are in agreement that ijtihad is the collective obligation (fard kafa'i) of all qualified jurists in the event where an issue arises but no urgency is encountered over its ruling. The duty remains unfulfilled until performed by at least one. **But ijtihad becomes a personal obligation (wajib or fard `ayn)** of the qualified mujtahid in **urgent cases**, when there is fear that the cause of justice or truth may be lost if ijtihad is not immediately attempted. **With regard to the mujtahid himself, ijtihad is a wajib 'ayni**: he must practice ijtihad in order to find the ruling for an issue that affects him personally. This is so because **imitation (taqlid) is forbidden to a mujtahid who is capable of deducing the hukm** directly from the sources. Furthermore, ijtihad is **recommended (mandub) in all cases**. And finally **ijtihad is forbidden (haram) when it contradicts the decisive rules** of the Qur'an, Sunnah and definite ijma'. [12. Shawkani, Irshad, p.235.]

When a mujtahid exerts himself and derives the ruling of a particular issue, but after a period **changes his opinion** on the same issue, he may set aside his initial ruling. **This would only affect him personally**. For example, when he enters a contract of marriage with a woman without the consent of her guardian (wali) and later changes his opinion on the validity of such a marriage, he must annul the nikah. But if his ijtihad affects others when, for example, he acts as a judge, he may not, according to the majority, set aside his earlier decision. [16. Amidi, Ihkam, IV, 14.] It is reported that `Umar adjudicated a case, known as Hajariyyah, in which the deceased, a woman, was survived by her husband, mother, two consanguine and two uterine brothers. 'Umar b. al-Khattab entitled all the brothers to a share in one-third of the estate. but was told by one of the parties that the previous year, he (`Umar) had not entitled all the brothers to share the portion of one-third. To this the caliph replied, 'That was my decision then, but today I have decided it differently.' Thus he upheld both his decisions and did not allow his latter decision to affect the validity of the former. [17. Ibn al-Qayyim, I'lam.] **Similarly, the decision of one judge may not be set aside by another**. It is reported that a man whose case was adjudicated by 'Ali and Zayd informed Umar of their decision, to which the latter replied that he would have ruled differently if he were the judge. The man replied, 'Then why don't you, as you are the Caliph?' `Umar replied that had it been a matter of applying the Qur'an or Sunnah, he would have intervened, but since the decision was based in ra'y, they were all equal in this respect. [18. Ibn al-Qayyim, I'lam.]The position is, however, different if the initial decision is found to be in violation of the law. In the ruling of `Umar conveyed in his well-known letter to Abu Musa al-Ash'ari: 'After giving a judgment, if upon reconsideration you arrive at a different opinion, do not let the judgment stand in the way of retraction. For justice may not be disregarded, and you are to know that it is better to retract than to persist injustice.' [19. Ibn al-Qayyim, I'lam.] **The legal maxim provides** that **'ijtihad may not be**

overruled by its equivalent' (al-ijtihad la yunqad bi-mithlih). Consequently, unless the judge and the mujtahid is convinced that his previous ijtihad was erroneous, he must not attempt to reverse it.

The Proof (Hujjiyyah) of Ijtihad

Ijtihad is validated by the Qur'an, the Sunnah and the dictates of reason (`aql). **Of the first two, the Sunnah is more specific.**

The Hadeeth of Mu`adh b. Jabal, as al-Ghazali points out, provides a clear authority for ijtihad.[42] [21. Ghazali, Mustasfa, II, 63-64.]

According to another Hadeeth, **'When a judge exercises ijtihad and gives a right judgment, he will have two rewards, but if he errs in his judgment, he will still have earned one reward.'** [22. Abu Dawud, Sunan, III, 1013, Hadeeth no. 3567.]

The numerous Qur'anic ayat that relate to ijtihad are all in the nature of probabilities (zawahir). All the ayat quoted in support of qiyas can also be quoted in support of ijtihad. In addition, we read, in sura al-Tawbah (9:122): **'Let a contingent from each division of them devote themselves to the study of religion [li-yatafaqqahu fi'l-din] and warn their people [. . .]'** Devotion to the study of religion is the essence of ijtihad, which should be a continuous feature of the life of the community. On a similar note, we read in sura al-Ankabut (29:69): **'And those who strive [wa'l-ladhina jahadu] in Our cause, We will certainly guide them in Our paths.'** It is interesting that in this ayah the word subulana ('Our paths') occurs in the plural form, which might suggest that there are numerous paths toward the truth, which are all open to those who exert themselves in its pursuit. Furthermore, we read in sura al-Nisa' (4:59): **`If you dispute over something, then refer it to God and to the Messenger.'** The Companions practiced ijtihad, and their consensus is claimed in support of it. [27. Ibn al-Qayyim, I'lam, I, 176.] In their search for solutions to disputed matters, they would base their judgement on the Qur'an and Sunnah, but if they failed to find the necessary guidance therein, they would resort to ijtihad. The fact that the Companions resorted to ijtihad in the absence of a nass is established by continuous testimony (tawatur). [28. Ibn al-Qayyim, I'lam, I, 176.] **The rational argument in support of ijtihad is** to be sought in the fact that while the nusus of Shari'ah are limited, new experiences in the life of the community continue to give rise to new problems. It is therefore imperative for the learned to find solutions to such problems through ijtihad. [29. Cf. Kassab, Adwa', p. 20.]

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[42] He adds: The claim that this Hadeeth is mursal (i.e. a Hadeeth whose chain of narration is broken at the point when the name of the Companion who heard it from the Prophet is not mentioned) is of no account. For the ummah has accepted it and has consistently relied on it; no further dispute over its authenticity is therefore warranted.

Conditions (Shurut) of Ijtihad

The mujtahid must be a Muslim and a competent person of sound mind who has attained a level of intellectual competence which enables him to form an independent judgment. In his capacity as a successor to the Prophet, the mujtahid performs a religious duty, and his verdict is a proof (hujjah) to those who follow him; he must therefore be a Muslim, and be knowledgeable in the various disciplines of religious learning.

The requirements discussed below contemplate ijtihad in its unrestricted form (ijtihad fi'l-shar`), as opposed to the varieties confined to a particular school. The earliest complete account of them is given in Abu' Husayn al-Basri's (d. 436/1044) al-Mu'tamad, and later accepted, with minor changes, by al-Shirazi (d. 467/1083), al-Ghazali (d. 505/111) and al-Amidi (d. 632/1234). [30. Cf. Hallaq, The Gate, pp. 14-17.] These are:

(a) **Knowledge of Arabic** to the extent that enables him to enjoy a correct understanding of the Qur'an and Sunnah. A complete command and erudition is not a requirement.[31. Ghazali, Mustasfa, II, 102.] Al-Shatibi lays greater emphasis on Arabic: a person who possesses only an average knowledge of Arabic cannot aim at the highest level of attainment in ijtihad. The language of the Qur'an and Sunnah is key to their comprehension. [32. Muwafaqat, IV, 60.]

(b) **He must also be knowledgeable in the Qur'an**, the Makki and Madinese contents, occasions of revelation (asbab al-nuzul) and abrogation. More specifically, the legal contents, or ayat al-ahkam, but not necessarily the narratives and parables, and passages relating to the hereafter.[33. Ghazali, Mustasfa, II, 101.] According to some, including al-Ghazali, Ibn al-Arabi, and al-Razy, the legal ayat amount to about five hundred. Al-Shawkani, however, observes this cannot be definitive. For a mujtahid may infer a legal rule from the narratives and parables. The knowledge of ayat al-ahkam includes the commentaries (tafasir) with special reference to the Sunnah and views of the Companions. Al-Qurtubi's Tafsir, and the Ahkam al-Qur'an of Abu Bakr Ibn al-'Arabi and 'Ali al-Jassaas, are particularly recommended. [34. Shawkani, Irshad, pp. 250-51.]

(c) **Knowledge of the Sunnah**, especially what relates to the subject of his ijtihad. This is the view of those who admit divisibility (tajzi'ah) of ijtihad, but if ijtihad is deemed indivisible, then the mujtahid must be knowledgeable of the Sunnah as a whole, especially the ahkam texts (**aHadeeth al-ahkam**.) He must know the incidences of abrogation, the general and specific, the absolute and qualified, and the reliability or otherwise of the narrators. **It is not necessary to commit to memory aHadeeth al-ahkam or the names of narrators**, but he must know where to find them, and be able to distinguish the reliable from the weak. [35. Shawkani, Irshad, p.251 ff.] Ghazali points out that an adequate familiarity with aHadeeth al-ahkam such as those found in Sunan Abi Dawud, al-Bayhaqi, or the Musnad of Ibn Hanbal suffice. According to another view, attributed to Ahmad b. Hanbal, the aHadeeth al-ahkam are likely to number in the region of 1200. [36. Ghazali, Mustasfa, II, 101.]

(d) **The knowledge of furu`** and the points on which there is **ijma'**. By implication, the mujtahid must also be aware of the **opposing views**, as it is said, 'the most learned of people is also one who is most knowledgeable of the differences among people'. [37. Shawkani, Irshad, p. 251.]

(e) **[Usool, Objectives and Qawa'id]** with a special emphasis on qiyas. The Qur'an and Sunnah, on the whole, do not completely specify the law as in a juristic manual, but general rulings and indications as in the causes of such rulings. The mujtahid is thus enabled to have recourse to analogical deduction in order to discover the ruling. [38. Shawkani, Irshad, p. 252.] Furthermore, the mujtahid should know the **objectives (maqasid)** of the Shari'ah, which consist of the masalih (considerations of public interest). The most important masalih are those the Lawgiver has Himself identified. Thus the **protection of the `Five Principles'**, namely, religion, life, intellect, lineage and property, are the recognised objectives. These are the essentials (daruriyyat) and as such they are distinguished from the complementary (hajiyyat) and embellishments (tahsiniyyat). The mujtahid must also know the **general maxims of fiqh** such as: the removal of hardship (raf`al-haraj), that certainty must prevail over doubt. [39. Shawkani, Irshad, p. 252.]

(f) **And finally, the mujtahid must be an upright (`adil) person** who refrains from committing sins and whose judgement the people can trust. His sincerity must be beyond question and untainted with self-seeking interests. For ijtihad is a sacred trust.[42. Ghazali, Mustasfa, II, 101.]

It is further suggested in this connection that the mujtahid must be capable of distinguishing strength and weakness in reasoning. This prompted some to say he should have a knowledge of logic (mantiq). But this is not strictly a requirement. For logic as a discipline had not even developed during the time of the Companions. [41. Abu Zahrah, Usul, pp. 308-309.]

Some suggested that the practice of ijtihad was abandoned partly because the qualifications required were 'set so high that they were humanly impossible of fulfilment'. [44. Cf. Fazlur Rahman, Islam, p. 78.] This is, however, an implausible supposition advanced mainly by the proponents of taqlid with a view to discouraging ijtihad. As for the actual conditions, Abdur Rahim (with many) aptly observed that `the qualifications required seem to be extremely moderate'. [45. Abdur Rahim, Jurisprudence, p. 174.] The task was further facilitated by the Hadeeth which absolved the mujtahid who committed an error from sin and even entitled him to a reward. Furthermore, the divisibility of ijtihad, as we shall discuss, enabled the specialist in particular areas to practice ijtihad.

Divisibility of Ijtihad

The question to be discussed here is whether a person who is learned on a particular subject is qualified to practice ijtihad in that area. **The majority held** the view that once a person has fulfilled the necessary conditions of ijtihad he is qualified to practice it in all areas of Shari'ah. According to this view, the intellectual ability and competence of a mujtahid cannot be divided. Ijtihad, in other words, is **indivisible**. To say otherwise would be tantamount to a contradiction, as ijtihad and taqlid cannot be combined in one.[47. Shawkani, Irshad, p. 254.] It is further argued that all the branches of Shari`ah are interrelated. The majority view is further supported by the

argument that once a person has attained the rank of mujtahid he is no longer permitted to follow others.[48. Amidi, Ihkam, IV, 204; Shawkani, Irshad, p.255.] Among the majority some allowed an exception to the indivisibility of ijtihaad in the area of inheritance, which is considered self-contained and independent. [49. Kassab, Adwa', p. 96.] **Some Maliki, Hanbali and Zahiri ulama, however, held the view that ijtihad is divisible.** This would in no way violate any of the accepted principles of ijtihad. There is similarly no objection, according to this view, to the possibility of a person being both a mujtahid and a muqallid. Thus a mujtahid may confine his ijtihad to the area of his specialisation. This has, in fact, been the case with many prominent Imams who have, on occasions, admitted lack of knowledge in regard to particular issues. Imam Malik is said to have admitted that in regard to thirty-six issues at least. But in spite of this, there is no doubt concerning Malik's competence as a fully-fledged mujtahid. [50. Shawkani, Irshad. p. 255.] **The view that ijtihad is divisible is supported by a number of prominent ulema**, including Abu'l-Husayn al-Basri, al-Ghazali, Ibn al-Humam, Ibn Taymiyyah, his disciple Ibn al-Qayyim and al-Shawkani. Al-Ghazali observes that a person may be particularly able to practice ijtihad in the form of analogy even if he is not an expert on Hadeeth. According to the proponents, if knowledge of all disciplines of Shari'ah were to be a requirement, it would impose a heavy restriction on ijtihad. [51. Ghazali, Mustasfa, II, 103; Shawkani, Irshad, p. 255.]

One might add that **in modern times**, in view of the sheer bulk of information, specialisation in any area of knowledge seem to hold the key to originality. One might also remark that the classification of mujtahids into ranks, such as mujtahids in a particular school or issues, takes for granted that ijtihad is divisible.

Procedure of Ijtihad

Since ijtihad occurs in a variety of forms, such as qiyas, istihsan, maslahah mursalah, and so on, each of these is regulated by its own rules. The ulama suggested that in practicing ijtihad, the jurist

- Must first look at the nusus of the Qur'an and Hadeeth, which must be given priority over all other evidences.
- Should there be no nass, then he may resort to the manifest text (zahir) of the Qur'an and Hadeeth and interpret it while applying the rules pertaining to the general (`amm) and specific (khass), the absolute and qualified, and so forth.
- Should there be no manifest text in the Qur'an and verbal Sunnah, the mujtahid may resort to the actual (fi'li) and tacitly approved (taqriri) Sunnah.
- Failing this, he must find out if there is a ruling of ijma` or qiyas available on the problem in the works of the renowned jurists.
- In the absence of any guidance, he may attempt an original ijtihad along the lines of qiyas.
- In the absence of a textual basis on which an analogy could be founded, the mujtahid may resort to any of the recognised methods of ijtihad such as istihsan, maslahah mursalah, istishab, etc.[52. Shirazi, Luma', pp. 83-84.]

The foregoing procedure has essentially been formulated by al-Shafi'i, who is noted to have observed the following. “When an incident occurs, the mujtahid must first check the nusus of the Qur'an, but if he finds none,

he must refer to Mutawatir Hadeeths and then to solitary Hadeeths. If the necessary guidance is still not forthcoming, he should postpone recourse to qiyas until he has looked into the manifest (zahir) text of the Qur'an. If he finds a manifest text which is general, he will need to find out if it can be specified by means of Hadeeth or qiyas. But if he finds nothing that would specify the manifest text, he may apply the latter as it stands. Should he fail to find a manifest text in the Qur'an or the Sunnah, he must look into the madhahib. If he finds a consensus among them, he applies it, otherwise he resorts to qiyas, but in doing so, he must pay more attention to the general principles of the Shari'ah than to its subsidiary detail. If he does not find this possible, and all else fails, then he may apply the principle of original absence of liability (al-bara'ah al-asliyyah). All this must be in full cognizance of the rules that apply to the conflict of evidences (al-ta`arud bayn al-adillah), which means that the mujtahid should know the methods deployed in reconciling such conflicts, or even eliminating one in favour of the other, should this prove to be necessary. The ruling so arrived at may be that the matter is obligatory (wajib), forbidden (haram), reprehensible (makruh), or recommended (mandub)." [53. Shafi'i, Risalah, pp. 261-62; Shawkani, Irshad, p. 258.]

Types of Ijtihaad (Procedures)

From the viewpoint of the procedure it employs, ijtihad may occur in any of the following four varieties:

1) **Juridical analogy (qiyas)** which is founded on an effective cause (`illah).
2) **Ijtihad which consists of a probability (zann)** without the presence of any `illah, such as practicing ijtihad in regard to ascertaining the time of salah or the direction of the qiblah.
3) **Ijtihad bayani,** or 'explanatory ijtihad': interpretation of the source materials, which takes priority over 'analogical ijtihad', or ijtihad qiyas.
4) **Ijtihad istislahi,** which is based on maslahah and deduces ahkam in pursuance of the spirit and purpose of Shari'ah, which may take the form of istislah, juristic preference (istihsan), obstruction of means (sadd al-dhara'i'), or some other technique.

Imam Shafi`i accepts only the first type[43], namely analogical ijtihad, but for the majority, ijtihad is not confined to qiyas. [54. Kassab, Adwa', p. 24.]

The Ijtihad of the Prophet and his Companions

The question to be discussed here is whether all the rulings of the Prophet should be regarded as having been divinely inspired or whether they also partake in ijtihad. **The ulama are generally in agreement that the Prophet practiced ijtihad in temporal and military affairs**, but they have differed as to whether his rulings in shar'i matters could properly fall under the rubric of ijtihad. **According to the Ash'aris, the Mu'tazilah, Ibn Hazm al-Zahiri and some Hanbali and Shafi'i ulema, the Qur'an provides clear evidence that every speech of the Prophet partakes in wahy**. A specific reference is thus made to sura al-Najm (53:3) which

[43] [Al-Haj: the first three types are accepted by ash-Shafi'i.]

provides **`He says nothing of his own desire, it is nothing other than revelation [wahy] sent down to him.'** [55. Shawkani, Irshad, p. 255.]

The majority, however, held that the Prophet in fact practiced ijtihad. This is borne out by the numerous ayat of the Qur'an where the Prophet is invited, along with the believers, to meditate on the Qur'an. As for the ayah in sura al-Najm above, the majority held that the reference here is to the Qur'an itself, and not to every word the Prophet uttered. That this is so is borne out by the use of the pronoun `it' (huwa) in this ayah, which refers to the Qur'an itself. The majority adds that the ayah was revealed in refutation of the unbelievers who claimed the Qur'an was the work of the Prophet himself. [56. Shawkani, Irshad, p. 256.]

The minority view on this subject overrules the claim of the practice of ijtihad by the Prophet and maintains that if it were true that the Prophet practiced ijtihad, then disagreeing with his views would be permissible. Opposing the Prophet is, however, clearly forbidden (al-Nisa', 4:14 and 58). There is yet a third opinion on this point which, owing to the conflicting nature of the evidence, advises total suspension. This view is attributed to al-Shafi'i and upheld by al-Baqillani and al-Ghazali. Al-Shawkani, however, rejects it by saying that the Qur'an gives us clear indications not only to that ijtihad was permissible for the Prophet, but also that he was capable of making errors. [57. Shawkani, Irshad, p. 256.] The majority view that the Prophet resorted to ijtihad finds further support in the Sunnah. Thus, according to one Hadeeth, the Prophet is reported to have said, **`When I do not receive a revelation (wahy) I adjudicate among you on the basis of my opinion (ra'y).'** [60. Abu Dawud, Susan (Hasan's trans.), III, 1017, Hadeeth no. 3578.]

Nonetheless, the ulama who have maintained this view add that such an error is not sustained, meaning that any error the Prophet might have made was rectified by the Prophet himself or through subsequent revelation. [58. Kassab, Adwa', p. 61.] Thus we find passages in the Qur'an which reproach the Prophet for his errors. To give an example, a text in sura al-Anfal (8:67) provide,: **`It is not proper for the Prophet to take prisoners [of war] until he has subdued everyone in the earth**: This ayah was revealed concerning the captives of Badr. It is reported that seventy persons were taken prisoner in the battle. Abu Bakr suggested that they should be released against a ransom, whereas `Umar held that they should be killed. The Prophet approved of Abu Bakr's view but the ayah then disapproved of taking ransom. Elsewhere, in sura al-Tawbah (9:43), in an address to the Prophet: **`God granted you pardon, but why did you permit them to do so before it became clear to you who was telling the truth?'** This ayah was revealed concerning the exemption that the Prophet granted, prior to investigating the matter, to those who did not participate in the battle of Tabuk. [59. Shawkani, Irshad, p. 256; Ghazali, Mustasfa, II, 104.]

Was ijtihad lawful for the Companions during the lifetime of the Prophet?

Once again the majority of ulama have held that it was, regardless as to whether it took place in the presence of the Prophet or in his absence. The ulama have, however, differed over the details.

- Ibn Hazm held that such an ijtihad is valid in matters other than halal and haram, whereas
- Al-Amidi and Ibn al-Hajib observed that it is only speculative and does not establish a definitive ruling.

- There are still others who have held that ijtihad was lawful for the Companions only if it took place in the presence of the Prophet, with his permission, or if the Prophet had approved of it in some way.

Those who invalidate that ijtihad maintain that the Companions had access to the Prophet in order to obtain the decisive and final authority. If one is able to obtain that, ijtihad is unlawful. [61. Shawkani, Irshad, p. 257.] This view is, however, considered to be weak as it takes for granted ready access to the Prophet; it also discounts the possibility that certain decisions had to be made by the Companions without delay. The correct view is that of the majority, which is supported by the fact that the Companions did, on numerous occasions, practice ijtihad both in the presence of the Prophet and in his absence. The Hadeeth of Mu'adh b. Jabal is quoted as clear authority to the effect that the Prophet authorised Mu'adh to resort to ijtihad in his absence (i.e. in the Yemen). [62. Ghazali, Mustasfa, II, 104.] It is also reported in a Hadeeth that when the Prophet authorised `Amr b. al-`As to adjudicate in some disputes, he asked the Prophet, **'Shall I render ijtihad while you are present?' To this the Prophet replied, 'Yes. If you are right in your judgement, you earn two rewards, but if you err, only one.'** It is similarly reported that **Sa'd b. Mu'adh rendered a judgment concerning the Jews of Banu Qurayzah in the presence of the Prophet, and that he approved of it**. [64. Shawkani, Irshad, p. 257.] Ghazali has however expressed reservations to ijtihad in the presence of the Prophet, as he considers that discourteous unless the Prophet granted permission. (Mustasfa, II, 104).

Truth and Fallacy of Ijtihad

The jurists differed as to whether every mujtahid can be assumed right in his conclusions. At the root of this question lies the uncertainty over the unity or plurality of truth in ijtihad. Has Almighty God predetermined a specific solution to every issue, which alone may be regarded as right? This would in turn beg the question of whether it is at all possible for the mujtahid to commit a sin by rendering an erroneous ijtihad. The ulama are in agreement that:

In regard to the essentials of dogma, such as the oneness of God, His attributes, the truth of the Prophethood of Muhammad, the hereafter, and so on, there is only one truth and anyone, whether a mujtahid or otherwise, who takes a different view renounces Islam. [65. Shawkani, Irshad, p. 259.]

With regard to juridical or shar'i matters, the majority, including the Ash'aris and Mu`tazilah, recognise two types:

1) **Juridical matters determined by a definitive text**, such as the obligatoriness of salah and other pillars of faith, the prohibition of theft, and so on. Here, once again, there is only one truth. Anyone who takes an exception to it commits a sin, and to some[44], even heresy and disbelief.

2) **Shar'i matters on which no decisive ruling is found in the sources**.

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[44] [Al-Haj: I don't know of any scholar who wouldn't consider the denial of the obligation of prayer a matter of disbelief.]

(a) The Ash'aris and Mu'tazilah have held the view that ijtihad in regard to such matters is always meritorious and partakes in truth regardless of the its results.

(b) But according to the four leading imams and many other ulema, only one of the several opposing views may be correct. For it is impossible to say that one and the same thing at the same time regarding the same person could be both lawful and unlawful. [66. Shawkani, Irshad, pp. 260-61.]

This view quoted the ayah: "**And when David and Solomon both passed judgement on the field where some people's sheep had strayed to pasture there at night, We acted as Witnesses for their decision. We made Solomon understand it. To each We gave discretion and knowledge [...]**" (al-Anbiya', 21:78-79). Had there been more than one correct solution to a juridical problem, then this ayah would have upheld both judgements. Furthermore, when one looks at the practice of the Companions, it will be obvious that not only did they admit the possibility of error in their own judgements but that they also criticised one another. To give an example, the Caliph Abu Bakr is reported to have said in regard to the issue of kalalah (i.e. when the deceased leaves no parent or child to inherit him): 'I decided the question of kalalah according to my opinion. If it is correct, it is an inspiration from God; if it is wrong, then the error is mine and Satan's: [67. Amidi, Ihkam, IV, 187.]

The minority view quotes in support the same Qur'anic text which refers to David and Solomon with the words: **'To each We gave discretion and knowledge.'** Had either of them committed an error, God would not have praised them both. It is further argued that had there been only one truth, the mujtahid would not have been bound by the result of his own ijtihaad, which suggests that every mujtahid attains the truth. [69. Shawkani, Irshad, p. 262.] The Shari'ah authorises the Imam or mujtahid to appoint as judge another mujtahid who may differ with him. For example, Abu Bakr appointed Zayd b. Thabit as a judge while it was common knowledge Zayd differed with him on many issues. And lastly, they referred to the Hadeeth: **`My Companions are like stars; any one of them that you follow will lead you to the right path.'** [70. Shawkani, Irshad, p. 262.]

These differences may be resolved, as the majority suggests, in the light of the celebrated Hadeeth: **'When a judge renders ijtihad and gives a right judgement, he will have two rewards, but if he errs, he will still have earned one reward.'** This Hadeeth clearly shows that the mujtahid is either right (musib), or in error (mukhti'), but that sin attaches to neither. [71. Shawkani, Irshad, p. 261.]

Classification and Restrictions

In their drive to impose restrictions on ijtihad, the ulama of usul of the fifth/eleventh century and the subsequent period classified ijtihad into categories. Initially it was divided into two types:

1) Independent ijtihad which aims at deducing the law from the sources; and
2) Limited ijtihad concerned mainly with elaboration and implementation of the law within the confines of a particular school.

During the first two and a half centuries, there was never any attempt at denying a scholar the right to find his own solutions. From about the middle of the third/ninth century, the idea began to gain currency

that only the great scholars of the past had enjoyed the right to practice ijtihad. [72. Cf. Schacht, 'Idjtihad', Encyclopedia of Islam, IV, 1029.] Before the fifth/eleventh century, no trace may be found of any attempt to classify ijtihad. **Al-Ghazali (d. 505/1111) was the first to divide ijtihad into two categories**. [73. Hallaq, The Gate, p. 18.] This division was later developed into five, and eventually seven. While representing the prevailing opinion of his time, al-Ghazali admitted that independent mujtahids were already extinct. [74. While quoting Ghazali's statement, Shawkani (Irshad, p. 253) considers it of questionable validity and adds that Ghazali almost contradicted himself when he said that he did not follow Shafi'i in all his opinions.]

About two centuries later, the number of the ranks of mujtahidun reached five, and by the tenth/sixteenth century seven, while from the sixth/twelfth century onwards jurists are said to belong to only to the last two categories on the scale of seven. [75. Hallaq, The Gate, p. 84ff.] This is as follows:

[Classification of Mujtahids]

Full Mujtahid (mujtahid fi'l-shar')

They deduced the ahkam from the sources, and were not restricted by a particular madhhab. The learned among the Companions, and the leading jurists of the succeeding generation, like Sa`id b. al-Musayyib and Ibrahim al-Nakha'i, the leading Imams of the four schools and many others were identified as independent mujtahids. [76. Abu Zahrah, Usul, p. 310.]

The question arises whether this type of ijtihad is still open. With the exception of the Hanbalis, the ulama of the other three schools acceded to the view that independent ijtihad discontinued. [78. While stating the position of the three Sunni schools on the point, Abu Zahrah (Usul, p. 311) adds that this is not definite as, for example, some Hanafis considered Kamal al-Din ibn al-Humam as a mujtahid of the first class.] Another related question debated by the ulama is whether total extinction of mujtahids is at all acceptable from the viewpoint of doctrine. Could the Shari'ah entertain such a possibility and maintain its own continuation, both at the same time? The majority, including al-Amidi, Ibn al-Hajib, Ibn al-Humam, Ibn al-Subki, and Zakariya al-Ansari answered this question in the affirmative, whereas the Hanbalis held otherwise.

The Hanbalis argued that ijtihad is an obligatory duty whose total abandonment would amount to an agreement on error, which is precluded by the Hadeeth **'My community shall never agree on an error.'** [79. Muslim, Sahih, p. 290, Hadeeth no. 1095; Shawkani, Irshad, p. 253; Ghazali, Mustasfa, I, 111.] To say that ijtihad is a wajib, whether `ayni or kafa'i, takes it for granted that it may never be discontinued. This is also the implication of another Hadeeth **'a section of my ummah will continue to be on the right path; they will be the dominant force and they will not be vanquished till the Day of Resurrection.'** [80. Muslim, Sahih, p. 290, Hadeeth no. 1095; Ghazali, Mustasfa, I, 111.] Since the successful pursuit of truth is not possible without knowledge, the survival of mujtahidun in any given age is therefore sustained by this Hadeeth. And finally, the notion of the **discontinuation of ijtihad appears in conflict with some important doctrines of Shari'ah. Ijma', for example, and the procedures of qiyas** all contemplate the existence of mujtahidun in every age. [82. Cf. Abdur Rahim, Jurisprudence, p. 174.]

Mujtahids within the School

They expounded the law within the confines of a particular school while adhering to the principles of their Imams. Among the prominent names in this category are Zufar b. al-Hudhayl, Hasan b. Ziyad in the Hanafi school; Isma'il b. Yahya al-Muzani, 'Uthman Taqi al-Din b. al-Salah and Jalal al-Din al-Suyuti in the Shafi'i; Ibn `Abd al-Barr and Abu Bakr b. al-`Arabi in the Maliki, and Ibn Taymiyyah and his disciple Ibn Qayyim al-Jawziyyah in the Hanbali schools. It is observed that although these ulama followed the doctrines of their schools, they did not consider themselves bound to follow their masters in the implementation of the principles, so they held opinions opposed to those of their Imams. [83. Abu Zahrah, Usul, p. 312.]

Mujtahids on Particular Issues

These were competent to elucidate and apply the law in particular cases which were not settled by the jurists of the first and second ranks. They did not oppose the leading mujtahidun. Their main pre-occupation was to elaborate the law on fresh points not clearly determined by the higher authorities. Scholars like Abu'l-Hasan al-Karkhi and Abu Ja'far al-Tahawi in the Hanafi school, Abu al-Fadl al-Marwazi and Abu Ishaq al-Shirazi in the Shafi'i, Abu Bakr al-Abhari in the Maliki and 'Umar b. Husayn al-Khiraqi in the Hanbali schools have been placed it this category.

The preceding three classes were designated as mujtahids, but the remaining four have been classified as imitators.[84. Abu Zahrah, Usul, p. 314.]

The so-called ashab al-takhrij

These did not deduce the ahkam but were well conversant in the doctrine and were able to indicate which view was preferable in cases of ambiguity, or regarding suitability to prevailing conditions. [85. Abu Zahrah, Usul, p. 315.]

The ashab al-tarjih

These were competent to make comparisons and distinguish the correct (sahih) and the preferred (rajih, arjah) and the agreed upon (mufta biha) views from the weak ones. Authors like 'Ala' al-Din al-Kasani and Burhan al-Din al-Marghinani of the Hanafi school, Muhyi al-Din al-Nawawi of the Shafi'i, Ibn Rushd al-Qurtubi of the Maliki and Muwaffaq al-Din ibn Qudamah of the Hanbali schools and their equals have been placed in this category. [86. Abu Zahrah, Usul, p. 315.]

The so-called ashab al-tashih

These could distinguish between the manifest (zahir al-riwayah) and the rare and obscure (al-nawadir) views of the schools of their following. Textbook writers whose works are in use in the various madhahib are said to fall into this category. [87. Abu Zahrah, Usul, p. 315.] It will be noted here that the previous three categories are somewhat overlapping and could be unified under one category.

And finally the muqallidun, or the `imitators

These lack the abilities of the above and comprise all who do not fall in any of the preceding classes. It is said concerning them that, They do not distinguish between the lean and the fat, right and left, but get together whatever they find, like the one who gathers wood in the dark of the night. [88. Abu Zahrah, Usul, p.316.]

The restrictions imposed on ijtihad and the 'closing of its gate' are, in the most part, an historical development which could find little if any support in the legal theory. Similarly, the notion that the ulema, at around the beginning of the fourth century, reached such an immutable consensus of opinion that further ijtihad was unnecessary is ill-conceived and untenable. [90. Cf. Weiss, 'Interpretation', p. 208.] The mendacity of such a claim is attested by the rejection on the part of numerous ulema, including those of the Hanbali and the Shi'ah Imamiyyah. **Authors throughout the Muslim world have begun to criticise taqlid** and advocate the continued validity of ijtihad. A number of most prominent ulema, including Shah Wali Allah, Muhammad b. Isma'il al-San'ani, Muhammad bin `Ali al-Shawkani and Ibn 'Ali al-Sanusi led the call for the revival of ijtihad. [91. Further details on developments in Hijaz and the Indian subcontinent can be found in Fazlur Rahman, Islam, p.197 ff.] The nineteenth century Salafiyyah movement in Egypt advocated the renovation of Islam in the light of modern conditions and total rejection of taqlid. AI-Shawkani (d.1255/1839) vehemently denies the claim that independent mujtahidun have become extinct. **He goes on to name ulama who achieved the highest rank of erudition. Among the Shafi`is, for example, at least six such ulama can be named.** These are 'Izz al-Din ibn 'Abd al-Salem and his disciple, Ibn Daqiq al-`Id, then the latter's disciple Muhammad ibn Sayyid al-Nas, then his disciple Zayn al-Din al-'Iraqi, his disciple Ibn Hajar al-`Asqalani, and his disciple, Jalal al-Din al-Suyuti. That they were all full mujtahids is attested by the calibre of their works. In his well-recognised juristic work. Al-Bahr al-Muhit, al-Zarkashi acknowledged that they had both attained the rank of mujtahid. 'It is utter nonsense' writes al-Shawkani, `to say that God Almighty bestowed the capacity for knowledge and ijtihad on the bygone generations of ulama but denied it to the later.' What the proponents of taqlid are saying to us is that we must know the Qur'an and the Sunnah through the words of other men while we still have the guidance in our hands. Praise be to God, this is the greatest lie (buhtanun 'azim) and there is no reason in the world to vindicate it. [92. Sawkani, Irshad, p. 254] **Iqbal Lahori** considers the alleged closure of the gate of ijtihad to be 'a pure fiction' suggested partly by the crystallization of legal thought in Islam, and partly by intellectual laziness. [93. Iqbal, Reconstruction, p. 178.] **Abu Zahrah** is equally critical of the alleged closure of the door of ijtihad. He said: the fact that ijtihad has not been actively pursued has had the chilling effect of moving the people further away from the sources of the Shari'ah. The tide of taqlid carried some so far as to say that there is no further need to interpret the Qur'an and Hadeeth now. In Abu Zahrah's phrase, 'nothing is further from the truth - and we seek refuge in God from such excesses'. [94. Abu Zahrah, Usul, p. 318.]

Conclusion

The conditions under which ijtihad was formerly practiced by the early ulama are **no longer what they were**. For one thing, the **prevalence of statutory legislation** as the main instrument of government led to further restrictions on ijtihad. The fact that the law of the land in the majority of Islamic countries has been confined to the statute book, and the parallel development whereby the role of interpreting the statute has also been assigned to the courts of law, has had a discouraging effect on ijtihad.

It was this total neglect of ijtihad which prompted Iqbal to propose, in his well-known work 'The Reconstruction of Religious Thought in Islam, **that the only way to utilise ijma` and ijtihad (referred to as 'principle of movement') into modern government is to institutionalise ijtihad** (P. 174). The revival of ijtihad would necessitate efforts the government must undertake. **Since education is the responsibility of modern governments**, it should be possible to provide the **necessary education that a mujtahid would need** to possess. Al-Tamawi further recommends the setting up of a council of mujtahids to advise in the preparation and approval of statutory law to ensure its harmony with Shari'ah. [95. Tamawi, Al-Sulutat, p. 307.]

This is **not to say that the traditional forms of learning** in Shari`ah, or of practice of ijtihad, are **obsolete**. Contrarily, the contribution the ulama can make, in their individual capacities should never be underestimated.

The universities in many Islamic countries are committed to training lawyers in the modern law. To initiate a comprehensive programme of education for prospective mujtahids, which would combine training in both traditional and modern legal disciplines, would not seem to be beyond the capabilities of universities. Furthermore, **in a Shari'ah-oriented government it would seem desirable that the range of selection to senior advisory, educational and judicial posts would include the qualified mujtahidun**. This would hopefully provide the basis for healthy competition and incentives for high performance among the candidates.